

EXHIBIT A

Proceedings

150

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NASSAU: CRIMINAL TERM PART 85

3 - - - - -X

4 THE PEOPLE OF THE STATE OF NEW YORK,

5 -against-

Indictment

6 JOSIAH GALLOWAY,

No. 1315N-08

7 Defendant.

8 - - - - -X

9 November 7, 2008
10 262 Old Country Road
Mineola, New York

11 B E F O R E:

12 HON. PHILIP GRELLA,
13 Acting Supreme Court Justice

14 A P P E A R A N C E S:

15 (SAME AS PREVIOUSLY NOTED)

16
17 JANINE M. COLASANTI,
18 Official Court Reporter

19 **** **** **** ****

20
21 THE CLERK: This is the case of the People
22 versus Josiah Galloway, Indictment 1315N of 2008.

23 This is a Huntley/Wade/Dunaway hearing
24 continued from yesterday.

25 Are the People ready to proceed?

Janine M. Colasanti, RPR, OCR

Det. DeCaro - People - Cross 151

1 MR. LaROCCA: The People are ready.

2 THE CLERK: Is the defense ready?

3 MR. BREWINGTON: The defense is ready.

4 THE CLERK: This is continued from the 5th.

5 THE COURT: Let's recall the witness and
6 then Mr. Brewington will continue from that point.

7 Before we start, does either side have any
8 kind of application?

9 MR. LaROCCA: No, your Honor. Thank you.

10 MR. BREWINGTON: None.

11 THE COURT: Okay. Let's recall the witness.

12 MR. LaROCCA: Detective DeCaro.

13 C H A R L E S D E C A R O, having been previously
14 duly sworn by the Clerk of the Court, resumed the
15 witness stand and further testified as follows:

16 MR. BREWINGTON: May I inquire, your Honor?

17 THE COURT: Yes.

18 CROSS-EXAMINATION

19 BY MR. BREWINGTON: (Continuing)

20 Q. Detective DeCaro, in your testimony when we were
21 last here, which was Wednesday, you indicated that it was
22 the nose that made you think that the person in the sketch
23 looked like Mr. Galloway; is that correct?

24 A. Yes, that was one of the facial features.

25 Q. I just want to be clear, your testimony was you

Det. DeCaro - People - Cross

152

1 specifically said, The nose, correct?

2 A. Okay, correct.

3 Q. Yes?

4 A. Yes.

5 Q. And with regard to the nose, can you tell us how
6 many other noses like Mr. Galloway's you had seen before?

7 MR. LaROCCA: Objection, your Honor.

8 THE COURT: Sustained.

9 Q. What was the distinctive aspect of Mr. Galloway's
10 nose that led you to call for the copy of the sketch?

11 A. It was very similar. It was similar in shape.
12 It resembled the drawing.

13 Q. And, sir, the drawing which is in evidence as
14 Defendant's B --

15 MR. BREWINGTON: Can we hand this to the
16 witness, please.

17 Q. Would you agree with me, based on your view of
18 the drawing, that the drawing has a person depicted with a
19 square jaw -- excuse me, a square cheekbone?

20 MR. LaROCCA: Objection, your Honor.

21 THE COURT: Sustained.

22 Q. How would you describe the cheekbone features in
23 B?

24 MR. LaROCCA: Objection.

25 THE COURT: Sustained.

Det. DeCaro - People - Cross

153

1 Q. Sir, what was the description, as you understood
2 it, of the person that was eventually depicted in the
3 sketch, please?

4 MR. LaROCCA: Objection.

5 THE COURT: I'll allow that.

6 A. I really don't remember the description. I just
7 remember seeing the picture every day that I sat at my
8 desk, staring at me.

9 Q. Did you ever learn, at the time that you called
10 for a photo array, what the description was that was given
11 of the suspect?

12 A. When I obtained a copy of the sketch, there was a
13 description on there, I believe.

14 Q. What was the description on the sketch, as you
15 understood it, please?

16 A. I believe --

17 MR. LaROCCA: Objection.

18 THE COURT: Sustained.

19 Q. Did you understand that the description given of
20 the person that allegedly shot the victim in this case was
21 a person who was a light-skinned black?

22 MR. LaROCCA: Objection.

23 THE COURT: I'll allow that question.

24 A. Can you please repeat, sir?

25 Q. Sure. Did you ever learn that the description of

Det. DeCaro - People - Cross

154

1 the person that allegedly shot this victim in this case
2 was a light-skinned black?

3 A. Later, when I obtained a copy of the sketch.

4 Q. Would you agree with me that Mr. Galloway is not
5 light skinned?

6 A. I wouldn't call him dark skinned. I'm looking at
7 him now. He doesn't appear dark skinned to me.

8 Q. Sir, my question called for a yes or no answer.

9 MR. LaROCCA: Objection.

10 THE COURT: Go on to the next question.

11 Q. Would you agree with me that Mr. Galloway is not
12 a light-skinned black African-American man?

13 MR. LaROCCA: Objection.

14 THE COURT: The question is, do you agree or
15 you do not agree?

16 A. I do not agree with you, sir.

17 THE COURT: Next question.

18 MR. BREWINGTON: Sir, the rights card, which
19 is in evidence as People's 10, I believe it is, may I
20 have that shown to the witness.

21 Q. That card was -- the time on it was 4:30 a.m.,
22 correct?

23 A. Yes, sir.

24 Q. And that would be at 4:30 a.m. on what day,
25 please?

Det. DeCaro - People - Cross 155

1 A. June 6, 2008.

2 Q. And you first came in contact with Mr. Galloway
3 at 12:30 that morning, correct?

4 A. No, sir.

5 Q. When did you first come in contact with
6 Mr. Galloway?

7 A. Contact, meaning getting to the office? I got to
8 the Hempstead Armory at approximately one a.m.

9 Q. And you began speaking to Mr. Galloway almost
10 immediately, correct?

11 A. No.

12 Q. How long did it take for you, after you reached
13 the Armory, to speak to Mr. Galloway, if you got there at
14 one o'clock?

15 A. It took us a while, because -- by the time we got
16 our paperwork together.

17 Q. Sir, my question was, how long?

18 A. A few hours.

19 Q. So you took a few hours until you first spoke to
20 Mr. Galloway after one o'clock; is that correct?

21 A. Yes, sir.

22 Q. So what time did you first begin speaking to
23 Mr. Galloway?

24 A. A few hours into it. I would say, roughly,
25 before the rights card, before I introduced myself. He

Det. DeCaro - People - Cross 156

1 was down the hall in a separate room. His codefendant was
2 talking.

3 Q. Do you have a time when you first began speaking
4 to Mr. Galloway? I'm going to ask if you can answer my
5 question yes or no. If you can answer the questions I
6 pose, let me know. If you can't, let me know that, too.

7 A. I introduced myself, who I was.

8 Q. It was a minute or two before when?

9 A. 4:30.

10 Q. Sir, so, therefore, if it was a minute or two
11 before 4:30, would you agree with me that at no time prior
12 to that card was Mr. Galloway advised of any rights? You
13 would agree with that, right?

14 A. Not by me or anyone I was with.

15 Q. You don't know of anyone that advised him of his
16 rights a minute or two before you presented him, as you
17 said, with the card, right?

18 A. It was myself and Detective D'Arienzo. We
19 advised him of his rights together.

20 Q. My question called for a yes or no. Can you
21 answer that?

22 A. I am not aware of anyone else advising him of his
23 rights besides me.

24 Q. Sir, at the time that you first questioned
25 Mr. Galloway, you attempted, based on your testimony, to

Det. DeCaro - People - Cross 157

1 get a written statement from him about another incident?

2 A. Right -- I'm sorry. Could you please repeat that
3 question?

4 Q. Before you questioned Mr. Galloway, according to
5 your testimony, you attempted to get a written statement
6 from him about another incident; isn't that right?

7 A. Before I questioned Mr. Galloway?

8 Q. Before you questioned Mr. Galloway about this
9 alleged incident.

10 A. Oh, yes.

11 Q. What time was that?

12 A. That was after I advised him of his rights. I
13 wasn't there for this.

14 Q. I'm sorry?

15 A. I wasn't there for the shooting at the cab stand.

16 Q. Sir, let me just ask you this question. I'm
17 trying to be very clear.

18 A. Okay.

19 Q. You attempted to obtain a statement from
20 Mr. Galloway prior to asking him any questions about the
21 matter that brings us before Judge Grella; is that
22 correct?

23 A. The matter before Judge Grella is the shooting at
24 the cab stand, yes.

25 Q. You also stated that the first time you gave

Det. DeCaro - People - Cross 158

1 Mr. Galloway his rights was sometime around 4:30, correct?

2 A. Correct.

3 Q. So, therefore, any statements that you claim that
4 you obtained, any statement -- withdrawn.

5 So, therefore, no rights were given prior to any
6 other statements taken from him, correct? Do you
7 understand my question?

8 THE COURT: I don't understand the question.

9 A. I don't understand it. I'm sorry, sir.

10 MR. BREWINGTON: Thank you, Judge.

11 Q. What time was the alleged written statement that
12 you claim you took from Mr. Galloway?

13 A. For which incident, sir?

14 Q. For the incident other than what is before Judge
15 Grella.

16 MR. LaROCCA: Objection. Just for clarity
17 sake.

18 THE COURT: Rephrase.

19 MR. BREWINGTON: Sure.

20 Q. There was an alleged statement taken about --
21 withdrawn.

22 MR. BREWINGTON: Let me do it this way,
23 Judge. I apologize.

24 Q. You allege that you took a written statement from
25 Mr. Galloway about punching someone in the face, correct?

Det. DeCaro - People - Cross 159

1 A. Yes. I believe that was the matter at the 590
2 building.

3 Q. And isn't it true that you allege, or you have
4 stated, that that was taken at 4 a.m.?

5 A. I don't recall that. I would have to see the
6 statement.

7 Q. Do you have the statement in your records?

8 A. I should.

9 THE WITNESS: If I can check, your Honor?

10 THE COURT: Okay. Has this been marked for
11 ID?

12 MR. LaROCCA: I don't believe it has.

13 THE COURT: Why don't we mark it for ID.

14 (Whereupon, People's Hearing Exhibit 13
15 was marked for identification, only.)

16 THE COURT OFFICER: People's 13 for
17 identification.

18 MR. BREWINGTON: May we show it to the
19 witness, please.

20 Q. Sir, do you have that document before you?

21 A. Yes, sir.

22 Q. Does that help refresh your recollection what
23 time you claim that statement was taken?

24 MR. LaROCCA: Excuse me. May I just know
25 what 13 is? I'm not clear on it.

Det. DeCaro - People - Cross 160

1 THE COURT: Detective, you're looking at
2 People's 13 for ID?

3 THE WITNESS: Yes, sir.

4 THE COURT: And you asked to review it to
5 refresh your recollection?

6 THE WITNESS: Yes, sir.

7 THE COURT: Would you just tell us what that
8 is?

9 THE WITNESS: This is a written statement I
10 obtained from Mr. Galloway for the Detective Division
11 case 3-27-67-08.

12 THE COURT: Is that referred to as the 590
13 incident?

14 THE WITNESS: Yes, the 590 incident.

15 THE COURT: Is everyone comfortable with
16 that statement?

17 MR. BREWINGTON: Yes.

18 MR. LaROCCA: I would just point out to the
19 Court, I think that is also Exhibit 11 for
20 identification, which I have here.

21 MR. BREWINGTON: It may be. I don't have
22 those records, Judge.

23 THE COURT: 11 was a copy. 13 is the
24 original. We will let them both remain.

25 At this time, I want to go on the record and

Det. DeCaro - People - Cross 161

1 apologize to the clerk who corrected me earlier.

2 BY MR. BREWINGTON: (Continuing)

3 Q. Sir, can you answer my question?

4 A. Does it help me, yes.

5 Q. How does it help you, in terms of what time?

6 A. Because Detective Lipson was with me when I
7 secured the statement. Detective Lipson wasn't back in
8 the office until after five o'clock from when he got back
9 from Glen Head from showing that second photo-pack to the
10 victim. It has to be after five o'clock. It takes a
11 couple of minutes to get from Glen Head back to Hempstead.

12 Q. Would it be accurate to say that statement,
13 according to you, would have been taken after the claimed
14 statements that you allege Mr. Galloway said about him
15 shooting at someone from across the corner?

16 A. That statement he made was after we thought we
17 were done.

18 Q. What time?

19 A. After we finished with this one and talking about
20 the other one, he brought that up to our attention. I
21 wasn't aware of that shooting.

22 Q. I'm asking you what time in the morning?

23 A. I want to say, it had to be light out. It had to
24 be probably close to seven.

25 Q. Close to seven o'clock?

Det. DeCaro - People - Cross 162

1 A. Yes, because we weren't aware of that. We had
2 the detective -- I can tell you because we had the
3 detective who was on that case. He had to bring that
4 information to us. He was working a day tour, and they
5 start at 7 a.m.

6 Q. Sir, let me ask you to take a look at what has
7 been previously marked for identification as Defendant's
8 D, which has been previously shown to you. Do you have
9 that?

10 A. Yes, sir.

11 MR. BREWINGTON: Judge, at this time, I
12 would like to move that into evidence, please, D, as
13 part of the material provided by the District
14 Attorney's office.

15 MR. LaROCCA: Objection.

16 THE COURT: Let me take a look at it.

17 Inasmuch as there is no objection,
18 Defendant's D.

19 MR. LaROCCA: I did object.

20 THE COURT: Did you say objection?

21 MR. LaROCCA: Yes. Then you said you wanted
22 to look at it.

23 THE COURT: Objection sustained.

24 MR. BREWINGTON: Please place it before the
25 witness again, for identification.

Det. DeCaro - People - Cross 163

1 Q. Looking at D for identification, does that help
2 refresh your recollection about when the alleged statement
3 was taken about the shooting of the gun across the street?

4 A. It has to do with photographs at 3:20 and at
5 5 a.m.

6 Q. The top part, sir. I don't want you to read from
7 it. Just tell us if that helps you.

8 A. I'm sorry. I'm not familiar with this form.

9 Q. Does that help refresh your recollection about
10 the time that the alleged statement concerning punching
11 Marky in the face took place?

12 A. Yes. There are two different times on here, sir.

13 Q. Does that help refresh your recollection, sir?

14 A. It says the approximate time was 4:30 a.m.

15 THE COURT: The question is, does that help
16 refresh your recollection?

17 THE WITNESS: Yes, this is the time that is
18 on there.

19 THE COURT: Detective, listen, a specific
20 question was posed. And the question was, does that
21 item help you to refresh your recollection?

22 THE WITNESS: Yes.

23 THE COURT: It either does or it doesn't.

24 THE WITNESS: Yes.

25 Q. And you refreshed your recollection at this

Det. DeCaro - People - Cross 164

1 time -- is that the written statement that you took at
2 4 p.m. on 6/6; is that right?

3 A. It says 4:30.

4 Q. Well, that's the oral statement; isn't it, sir?

5 A. He would have to tell me before I write it.

6 Q. What is your refreshed recollection?

7 A. 4:30. I know I was with Mr. Ogleytree for a
8 while.

9 Q. What statement was given at 4:30?

10 MR. LaROCCA: Can we get an a.m., p.m.?

11 MR. BREWINGTON: We'll get that.

12 MR. LaROCCA: I object. I'm asking for it
13 now, because it's not clear.

14 THE COURT: The witness didn't give an a.m.
15 or a p.m. He said, 4:30. The defense will be
16 entitled to pose a question referring to 4:30.

17 overruled.

18 Q. Which statement was taken at 4:30? When you tell
19 us 4:30, is that morning or evening?

20 A. It would have to be morning. And I said, the
21 oral statement.

22 Q. Was there a written statement taken at 4 a.m.?

23 A. No. I don't believe there was.

24 Q. Was there a written statement taken at 4 p.m.?

25 A. I don't think I was -- it might have been. I can

Det. DeCaro - People - Cross 165

1 get a crime report. Like I said, I was there for two
2 days. I was there into the next day. I would have to
3 check the crime report.

4 Q. You don't know without looking into some records?

5 A. Correct. I was there for about two days.

6 MR. BREWINGTON: Please, Judge, may he do
7 that?

8 THE COURT: Sure.

9 Q. Please tell us what document you are looking at
10 when you do look at it.

11 A. Once I find it.

12 Q. Sure.

13 THE WITNESS: Excuse me, your Honor. My
14 notes from that yellow legal pad, they were put into
15 evidence. I don't have that.

16 THE COURT: The DA has some documents that
17 he wants to hand up to the witness, which I'll
18 permit.

19 MR. BREWINGTON: Yes, Judge. I believe
20 those were marked for identification, Judge.

21 THE COURT: Those items are.

22 MR. LaROCCA: Exhibit 8, which is the note
23 Detective DeCaro signed.

24 MR. BREWINGTON: For ID.

25 THE CLERK: I believe the other is 12 for

Det. DeCaro - People - Cross 166

1 ID.

2 MR. LaROCCA: Exhibit 12 for ID.

3 THE COURT: Please hand both of those items
4 to the witness.

5 A. Okay.

6 Q. Do you have an answer for my question?

7 A. Please repeat the question.

8 Q. Did you take the written statement that you claim
9 was taken at 4 p.m.?

10 A. Yes.

11 Q. So it was taken --

12 A. That was after. Like I said, that was after the
13 fact. Now I'm seeing everything. We weren't there -- we
14 didn't -- we weren't there for the shooting on Hutchinson
15 and Tennessee. We didn't know about that. I have no
16 paperwork on that. That was after the whole fact.

17 MR. BREWINGTON: Judge, move to strike as
18 nonresponsive.

19 THE COURT: I'll let the answer stand.

20 Q. Sir, didn't you testify earlier that the first
21 statement that was taken was the written statement that
22 was about the fight that took place where Marky got
23 punched in the face; isn't that what your prior testimony
24 was?

25 A. Yes, that's correct. That was the first --

Det. DeCaro - People - Cross

167

1 Q. That's what you claim?

2 MR. LaROCCA: Judge, I'm going to object and
3 ask that he be allowed to finish.

4 MR. BREWINGTON: Judge, it was a yes or no.

5 THE COURT: I didn't hear the full question.
6 So let me hear the question and then I'll hear the
7 objection.

8 MR. LaROCCA: Thank you.

9 Q. Didn't you testify in your earlier testimony that
10 the first statement that was taken was a written statement
11 that dealt with Mr. Galloway allegedly punching Marky in
12 the face; yes or no?

13 A. Yes.

14 THE COURT: Objection overruled. The
15 question stands. The answer stands.

16 Q. And the first statement that you claim that was
17 taken, you claim was taken on the morning of the 6th,
18 correct, of the 6th, June 6th?

19 A. Yes, about the 590 incident.

20 Q. And sir, your testimony just now was that that
21 same statement, the 590 incident, took place and was given
22 in the afternoon, 4 p.m. of the 6th; is that your
23 statement?

24 A. No, it's not. I misspoke then. The first
25 incident was the --

Det. DeCaro - People - Cross 168

1 Q. Sir, you answered my question. So that we're
2 clear, what statement was it then that was taken at 4 p.m.
3 on the 6th, at the Armory, if it took place there?

4 A. At 4 p.m. That would be the last one that he
5 brought to our attention about the Tennessee Avenue.

6 Q. So based on -- and that would have been
7 4:30 p.m.?

8 A. Yes. After we were all done.

9 Q. I just want to be clear.

10 A. Yes, in the afternoon.

11 Q. So when was it that Mr. Galloway, according to
12 your testimony, left the Armory?

13 A. When they were finished with the arrest process.
14 I don't know what time he was transported. I didn't
15 transport.

16 Q. Sir, do you have 11 in front of you right there?

17 A. I may.

18 Q. That's the statement about the 590 incident.

19 A. Isn't 11 and 13 the same?

20 Q. I believe so.

21 A. 11 is a copy, and 13 is the original.

22 Q. Yes. Do you have that?

23 A. 13 I have in front of me.

24 Q. And it's your testimony that this document was
25 taken at what time?

Det. DeCaro - People - Cross 169

1 A. This was in the morning. This was after 4:30.
2 Approximately 4:30. This is the first thing we talked
3 about. That's what I was there for.

4 Q. And the statement, the alleged verbal statement
5 that you claim was taken about the shooting across the
6 street, what time was that taken?

7 A. After you brought it to my attention, it was
8 later in the afternoon; at the end, whenever everything
9 was wrapped up.

10 Q. On what day?

11 A. Same day, just later that afternoon.

12 Q. Sir --

13 A. June 6, 2008.

14 Q. At about what time?

15 A. I believe I said it was about 4 p.m., 1600 hours.

16 Q. At 4 p.m.?

17 A. Yes.

18 Q. And that meant that you had been questioning
19 Mr. Galloway, because you were still the person that
20 alleged -- you took that statement, right?

21 A. Yes.

22 Q. So you had been questioning Mr. Galloway from
23 sometime after 1 a.m, all the way around to 4 p.m.; is
24 that correct?

25 A. No, it's not.

Det. DeCaro - People - Cross 170

1 Q. So did you leave the Armory at any time from the
2 time you arrived there, between 12:30 and 1 a.m, until
3 4 p.m., when you claim this alleged statement was made?

4 A. No, I did not.

5 Q. And where was Mr. Galloway?

6 A. Mr. Galloway was in the middle holding cell down
7 the hall.

8 Q. And he was, basically, at that time, the person
9 that was the focus of your attention, correct?

10 A. As well as his codefendant.

11 Q. I'm sorry?

12 A. As well as his codefendant, Mr. Ogleytree.

13 MR. BREWINGTON: Judge, move to strike as
14 unresponsive.

15 THE COURT: It is not unresponsive. You
16 asked if he was the person who was the focus of his
17 --

18 MR. BREWINGTON: And he said, No. And I
19 said, who else?

20 THE COURT: I'll allow it to stand.

21 MR. BREWINGTON: I understand, Judge.

22 Q. As you were focusing on Mr. Galloway and his
23 codefendant, I asked you a question before, was he ever
24 fed during that time? Now that we know that you had him
25 until 4 p.m. the next day, was he fed?

Det. DeCaro - People - Cross

171

1 A. I don't recall. I believe so. I don't recall.

2 Q. Did he get anything to drink?

3 A. I don't recall.

4 Q. This is a person that you were dealing with
5 face-to-face, right?

6 A. Yes.

7 Q. A person that you were trying to get information,
8 soliciting information from, using interrogation, right?

9 A. Yes.

10 Q. And you don't know if the person that was under
11 your care, custody and control at that time was fed or
12 given water?

13 A. I believe he was. Could I say a hundred percent?
14 I don't know what he ate. I can't tell you what he drank.

15 Q. You don't know, do you?

16 A. No. I don't recall.

17 Q. As a matter of fact, sir, as you were talking to
18 Mr. Galloway on that day, did you notice any specific
19 facial -- any features about his dentures, that being his
20 teeth?

21 A. I don't recall any dentures.

22 Q. I'm talking about his teeth. I'm not talking
23 about replacement dentures. I'm talking about his dental
24 work.

25 A. You said, Dentures. I don't recall anything.

Det. DeCaro - People - Cross

172

1 Q. Did he have any broken teeth?

2 A. I don't recall any broken teeth.

3 Q. Sir, at the time that you were asking
4 Mr. Galloway questions from, according to you, 1 a.m.
5 through and including 4 p.m. on the 6th, did you at --
6 withdrawn.

7 From the time that you were asking Mr. Galloway
8 questions on that day, it just wasn't the morning, did you
9 actually see any of the alleged witnesses to the cab
10 shooting present at the Armory?

11 A. No, I did not. I spoke to them. I spoke to
12 them. I have no --

13 THE COURT: Detective, if either counsel
14 asks a yes or no question, the only possible answers
15 would be yes or no, or I can't answer that yes or no.

16 THE WITNESS: I apologize.

17 THE COURT: You don't have to apologize.

18 And then if either attorney wants to follow
19 up, they can do so.

20 THE WITNESS: Thank you.

21 Q. Sir, with regard to Mr. Galloway and his
22 appearance at the time that he was before you, that being
23 on the 6th from the morning until that afternoon, would
24 you agree with me that at all times, based on your
25 testimony, he had braids or cornrows in his head?

Det. DeCaro - People - Cross

173

1 A. Yes, I believe he did.

2 Q. And now that we know the length that he was in
3 your company, would you also agree that during that time
4 you did see the photo arrays which were put together by
5 Detective Lipson?

6 A. Yes.

7 Q. And would you also agree that when you saw the
8 photo arrays, which are in evidence as People's 1 and 3 --

9 MR. BREWINGTON: If we can show that to the
10 witness, Judge.

11 THE COURT: Okay.

12 Q. Would you also agree that when you looked at
13 those photographs, that none of the individuals in that
14 photograph, in that array of photographs, had cornrows or
15 braids?

16 MR. LaROCCA: Objection.

17 THE COURT: Overruled.

18 You can answer that.

19 A. Correct. No one has cornrows or braids.

20 Q. And would you also agree, sir, that based on your
21 knowledge of the description given of the alleged
22 perpetrator of the shooting of the cabdriver, that there
23 was never any mention of cornrows or braids?

24 A. I can't answer.

25 MR. LaROCCA: Objection.

Det. DeCaro - People - Cross

174

1 THE COURT: I'm going to let his answer
2 stand.

3 Q. Would you agree with me, sir, that at the time
4 that Mr. Galloway was in front of you, that there was no
5 question in your mind that his hairstyle was in the form
6 of cornrows or braids?

7 MR. LaROCCA: Objection. It's been asked
8 and answered.

9 THE COURT: Sustained.

10 Q. By the way, sir, at any time while Mr. Galloway
11 was in front of you on that day, did you attempt to try
12 and get a current picture of Mr. Galloway to use as part
13 of a photo array?

14 A. This was the most current photo we had in our
15 Rogues Gallery, yes.

16 MR. BREWINGTON: Move to strike as
17 unresponsive.

18 THE COURT: Would you read the question and
19 answer back?

20 (Whereupon, the court reporter read back
21 the requested testimony.)

22 THE COURT: The answer is stricken.
23 Can you answer that question?

24 THE WITNESS: Did I take a snapshot that
25 day? No. No, I did not. I used what I had.

Det. DeCaro - People - Redirect 175

1 Q. would you agree with me, what you had did not
2 match the hairstyle that Mr. Galloway had before you on
3 that day?

4 MR. LaROCCA: Objection.

5 THE COURT: Sustained.

6 MR. BREWINGTON: Judge, nothing further of
7 this witness at this time.

8 THE COURT: Any redirect?

9 MR. LaROCCA: Yes, your Honor. Thank you.

10 REDIRECT EXAMINATION

11 BY MR. LaROCCA:

12 Q. Detective DeCaro, when you responded to the
13 Hempstead Armory, roughly what time of the day or night
14 was that?

15 A. Approximately 1 a.m.

16 Q. Who were you going there to interview or meet
17 with?

18 A. Robert Ogleytree and Josiah Galloway.

19 Q. Which incident were they to be interviewed about?

20 MR. BREWINGTON: Objection, Judge. This is
21 repetitive. We had this on direct.

22 MR. LaROCCA: And on cross.

23 THE COURT: It was covered on cross.

24 MR. BREWINGTON: He is not bringing anything
25 new.

Det. DeCaro - People - Redirect 176

1 THE COURT: Overruled.

2 MR. BREWINGTON: Very well, Judge.

3 A. I was there for the home invasion, push-in
4 robbery, at the 590 Fulton Avenue incident.

5 Q. Who was the complainant in that case?

6 A. Marky Fouse.

7 Q. And at that point in time, were you there for any
8 other incident?

9 A. No, I was not.

10 Q. When you went there, did you meet with Josiah
11 Galloway immediately?

12 A. No, I did not.

13 Q. Did you interview both Robert Ogleytree and
14 Josiah Galloway in the course of that morning and
15 afternoon?

16 MR. BREWINGTON: Objection to the leading
17 form.

18 THE COURT: Overruled. You can answer.

19 A. Yes. Yes, I did.

20 Q. Who was the first person that you interviewed?

21 A. Mr. Ogleytree.

22 Q. And roughly when was that, if you recall?

23 A. About a half hour, forty minutes after we got
24 there he was willing to talk to us. And I had to take
25 advantage, go in and talk to him.

Det. DeCaro - People - Redirect 177

1 THE COURT: Just, if you don't mind, just
2 for purposes of the record, could you give me an
3 approximate time, rather than referring to a half
4 hour before?

5 THE WITNESS: Shortly before 2 a.m.

6 Q. Now, when you went there, prior to formally
7 interviewing Josiah Galloway, did you actually see him
8 physically?

9 A. Yes.

10 Q. Prior to talking to him about the facts and
11 circumstances of the 590 incident with the complainant,
12 Marky Fouse, did you advise him of his Miranda warnings?

13 A. Yes.

14 MR. BREWINGTON: Objection.

15 THE COURT: Overruled.

16 A. Yes, sir.

17 Q. What incident did you talk to him about after
18 advising him of his Miranda warnings, at least in sequence
19 first?

20 A. The Marky Fouse incident, the 590/600 incident.

21 Q. But prior to you ending your involvement with him
22 that day, did you have a conversation concerning a street
23 shooting?

24 MR. BREWINGTON: Objection.

25 THE COURT: Overruled.

Det. DeCaro - People - Redirect 178

1 A. Yes.

2 Q. And when did that conversation come up in
3 relation to any photo arrays that were done; in other
4 words, before, after, whatever?

5 A. After, sir.

6 Q. Now, you looked at a document to refresh your
7 recollection as to when the statement concerning the
8 street shooting was made. Do you recall doing that a
9 little while ago?

10 A. Yes.

11 Q. Was that your document?

12 A. No, it was not.

13 Q. Was that a document that you are familiar with?

14 A. No, it is not.

15 Q. Now, when you say that it refreshes your
16 recollection as to 4 p.m., just to be clear, do you have
17 now a specific recollection that it was 4 p.m., or are you
18 relying on the document itself?

19 MR. BREWINGTON: Objection.

20 THE COURT: Overruled.

21 A. The document helped that it was later in the day.

22 Q. So it puts it at the end of the process later in
23 the day?

24 MR. BREWINGTON: Objection.

25 THE COURT: Overruled.

Det. DeCaro - People - Recross 179

1 MR. BREWINGTON: It's leading, Judge.

2 THE COURT: Overruled.

3 A. Yes, sir.

4 Q. But as to the specific time, do you have any
5 recollection based on that document or anything else?

6 A. No.

7 Q. Do you see Josiah Galloway here today?

8 MR. BREWINGTON: Objection.

9 THE COURT: Overruled.

10 A. Yes, I do.

11 Q. Could you just point to him and tell us where he
12 is and describe an article of his clothing?

13 A. Mr. Galloway is in front of me, wearing the white
14 top, at the bench, next to his counsel.

15 MR. LaROCCA: Your Honor, may the Court
16 reflect the identification of the accused?

17 THE COURT: Yes.

18 MR. BREWINGTON: Note my objection. It
19 wasn't covered on direct or cross-examination.

20 Q. Was that the person you interviewed on June 6th?

21 A. Yes.

22 MR. LaROCCA: Thank you. Nothing further.

23 THE COURT: Any recross?

24 MR. BREWINGTON: Yes.

25

Det. DeCaro - People - Recross 180

1 RECROSS-EXAMINATION

2 BY MR. BREWINGTON:

3 Q. How much time did you spend in front of
4 Mr. Galloway, the man you just pointed out, during that
5 morning, sir?

6 A. How much time? A few hours.

7 Q. And he spoke with you, correct?

8 A. Yes.

9 Q. You looked at him as he spoke to you, correct?

10 A. Yes.

11 Q. You claim that you went there to interview
12 Mr. Ogleytree and Mr. Galloway about the 590 incident; is
13 that correct?

14 A. Yes, sir.

15 Q. Would it be accurate to say that with regard to
16 the interview to the 590 incident, that at that point when
17 you did speak to Mr. Galloway, that you took the written
18 statement, correct?

19 A. Yes.

20 Q. What time, just so we're clear now, did you take
21 that written statement? You say you spoke to him pretty
22 much right away, right?

23 A. Right away.

24 Q. When you first started speaking to him, that is
25 what you were there for, right?

Det. DeCaro - People - Recross 181

1 A. Yes.

2 Q. You spoke with him how long after you arrived?

3 A. That was a few hours.

4 Q. About what time was that?

5 A. That I arrived, or the time that I started
6 speaking to him?

7 Q. That you began speaking to him, sir.

8 A. That was, roughly, 4:30.

9 THE COURT: Just so the record is clear,
10 a.m. or p.m.?

11 MR. BREWINGTON: Very well, Judge.

12 THE WITNESS: 4:30 a.m., sir.

13 Q. You had been speaking with Mr. Ogleytree for how
14 long?

15 A. At least an hour and-a-half prior, about the
16 incident.

17 Q. It would be accurate to say you really hadn't
18 gone in front of or spoken to Mr. Galloway until you
19 eventually went to him about 4:00, 4:30?

20 A. Correct.

21 Q. Sir, how was it that you were able to call your
22 partner, Mr. Lipson, prior to three o'clock and tell him
23 to get the sketch of this guy that looked like the person
24 that was sitting right in front of you?

25 A. I wanted to see who was down the hallway. I saw

Det. DeCaro - People - Recross 182

1 in the room who was there.

2 Q. Sir, you said you were talking to the man, in
3 your prior testimony, for a while and he was talking to
4 you about the incident. And then based on that, you
5 looked at his nose and called your partner, Lipson, and
6 told him to give the sketch; isn't that your prior
7 testimony?

8 A. I don't recall that.

9 Q. I'm sorry?

10 A. I don't recall that, sir.

11 Q. Sir, didn't you testify and tell this judge that
12 you had been questioning Mr. Galloway for a period of
13 time? You kept saying to him, you look familiar, you look
14 familiar; didn't you say that?

15 A. I don't recall, sir.

16 Q. You don't recall your testimony from the day
17 before yesterday?

18 A. We talked about a lot of things.

19 Q. I know you did. My question is, do you remember
20 your testimony from the day before yesterday, yes or no?

21 MR. LaROCCA: Objection.

22 THE COURT: Everybody, there was a lot of
23 interrupting going on here, so there will be no more
24 interrupting.

25 Pose your next question.

Det. DeCaro - People - Recross 183

1 MR. LaROCCA: Your Honor, I object to the
2 line of questioning, it's well beyond the scope of
3 any redirect.

4 THE COURT: Sustained.

5 MR. LaROCCA: Thank you.

6 MR. BREWINGTON: Judge, he opened this door
7 with regard to the timing of it. I'm exploring the
8 timing of it.

9 THE COURT: I agree that the timing of the
10 statements were covered on direct, cross and redirect
11 and now recross. The timing --

12 MR. BREWINGTON: And that's what I'm dealing
13 with, Judge.

14 THE COURT: Of the statements.

15 MR. BREWINGTON: And that's what I'm dealing
16 with. Thank you, your Honor.

17 THE COURT: Okay.

18 BY MR. BREWINGTON: (Continuing)

19 Q. Sir, just so that we're clear, isn't it your
20 testimony that you contacted your partner, Detective
21 Lipson, at the time that you were questioning Mr. Galloway
22 about the 590 incident; yes or no?

23 MR. LaROCCA: Objection. Same objection.

24 THE COURT: Now, that aspect wasn't covered
25 on redirect.

Janine M. Colasanti, RPR, OCR

Det. DeCaro - People - Recross 184

1 MR. BREWINGTON: Judge, it's reasonably
2 related to timing, because he has now made a
3 statement -- may I ask the Court if I may speak to
4 the Court outside of the witness's presence, please?

5 THE COURT: If you don't mind, please.

6 THE WITNESS: I know my way.

7 (Whereupon, the witness leaves the
8 courtroom.)

9 THE COURT: I think that I've given both
10 sides some latitude, without letting things go too
11 far afield. And I think as a result everybody has
12 had more than adequate opportunity to question all
13 the witnesses, direct, cross, redirect, recross. But
14 we're not really going into the times now that
15 statements were given. We're kind of going into a
16 challenge with regard to him calling for the photo
17 array and so on and so forth, and that really was not
18 covered on redirect.

19 However, it was certainly covered on direct
20 and cross. And there is certainly more than enough
21 record, I believe, for you to make argument that I
22 think you're attempting to put on the record now.

23 But I think to go into the questioning now,
24 is well beyond the scope of redirect, and, therefore,
25 well beyond the scope of recross. If you take issue

Det. DeCaro - People - Recross 185

1 with that, I'll hear what you have to say.

2 MR. BREWINGTON: Judge, I respect the
3 Court's ruling. The only question I ask that I be
4 allowed to ask is what time was it that this witness
5 allegedly spoke to Detective Lipson in relationship
6 to the time that he took the statement which is
7 before the Court as 11 and 13.

8 THE COURT: Okay. In the spirit of the
9 timing aspect of the redirect, I'll allow that
10 question, and then we'll get on to something else.

11 MR. BREWINGTON: Very well, Judge.

12 THE COURT: Please bring the witness back.
13 (Whereupon, the witness resumed the witness
14 stand.)

15 THE COURT: Mr. Brewington.

16 MR. BREWINGTON: Thank you, Judge.

17 BY MR. BREWINGTON: (Continuing)

18 Q. Sir, would you please tell the Court, what time
19 was it that you first called Detective Lipson to put a
20 photo array together in relationship to the time that you
21 alleged that the statement, which is People's 11 and 13,
22 the time that that was taken? Do you have my question
23 before you?

24 A. The question, between 11 and 13 -- it's the same
25 document, 13?

Proceedings

186

1 Q. Yes, sir.

2 A. That had to be before three o'clock.

3 Q. Just so that we're clear, you did not speak to or
4 sit in front of Mr. Galloway to question him until
5 sometime after 4:30, right?

6 MR. LaROCCA: Objection. It's compound.

7 THE COURT: I'll allow it.

8 A. Sometime about -- repeat the last part, please.

9 MR. BREWINGTON: Judge, may we have that
10 read back, please?

11 THE COURT: Okay.

12 (Whereupon, the court reporter read back
13 the requested question.)

14 THE COURT: Can you answer that that's right
15 or that's not right?

16 THE WITNESS: That's right, to question him,
17 yes.

18 THE COURT: Read me back that question,
19 again, please.

20 (Whereupon, the requested question was read
21 back by the court reporter.)

22 MR. BREWINGTON: Thank you, Judge.

23 Nothing further.

24 THE COURT: Thank you, Detective.

25 THE WITNESS: Thank you, sir.

Proceedings

187

1 (Witness excused.)

2 THE COURT: Let's take a five-minute break,
3 and then we'll go on to the next witness.

4 MR. BREWINGTON: Very well, Judge.

5 (Whereupon, a short recess was taken.)

6 THE CLERK: People versus Josiah Galloway,
7 Indictment 1315N of '08. Hearing continued.

8 Are the People ready?

9 MR. LaROCCA: The People are ready.

10 THE CLERK: Is the defense ready?

11 MR. BREWINGTON: The defense is ready.

12 THE COURT: Any applications before we
13 continue?

14 MR. LaROCCA: I would like to advise the
15 Court, I have two witnesses remaining, Detective
16 Cunningham and Detective Ross. Detective Ross is
17 also involved in a serious matter in the grand jury.
18 He was called over for that, expecting to give very
19 brief testimony. So I would expect him to be
20 available momentarily, as well. Just in case he's
21 quick, I don't know for sure if Detective Ross would
22 be outside.

23 THE COURT: Okay.

24 MR. LaROCCA: Thank you. I have no other
25 application.

Det. Cunningham - People - Direct 188

1 MR. BREWINGTON: The only thing I would ask
2 is that the People tell us if there's -- I'm not sure
3 if Detective Cunningham was planned to be called, if
4 there is any additional Rosario --

5 MR. LaROCCA: I reviewed that matter with
6 Detective Cunningham, and we met beforehand. There
7 is no additional Rosario.

8 May I?

9 THE COURT: People, yes.

10 Det. K E V I N C U N N I N G H A M, Shield #112,
11 assigned to the Hempstead Village Police Department of
12 the Nassau County Police Department, called as a
13 witness on behalf of the People, having been duly
14 sworn by the Clerk of the Court, was examined and
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LaROCCA:

18 Q. Good morning, Detective Cunningham.

19 A. Good morning.

20 Q. Detective, how long have you been a member of the
21 Hempstead Police Department?

22 A. I'm in my 22nd year.

23 Q. Were you present on May 27, 2008 when Detective
24 Aichen was speaking with a person by the name of Marky
25 Fouse?

Det. Cunningham - People - Direct 189

1 MR. BREWINGTON: Objection.

2 THE COURT: Overruled.

3 MR. BREWINGTON: Relevance?

4 THE COURT: Overruled.

5 A. I was present when the statement was taken, yes.

6 Q. Did you hear the conversation between Detective
7 Aichen and Marky Fouse?

8 MR. BREWINGTON: Objection.

9 THE COURT: Overruled.

10 A. Yes, I did.

11 Q. Can you tell us why Marky Fouse was there, and
12 what the sum and substance of that conversation was?

13 MR. BREWINGTON: Objection.

14 THE COURT: Overruled.

15 MR. BREWINGTON: Judge, this is May 27th?
16 Objection.

17 THE COURT: Detective, just step outside for
18 a moment.

19 (Whereupon, the witness was leaves the
20 courtroom.)

21 THE COURT: I'll let you put on the record
22 the basis of your objections.

23 MR. BREWINGTON: Very well, Judge.

24 First, as I understand, we were not told
25 that this witness was going to be part of their

Det. Cunningham - People - Direct 190

1 original case, but I understand he's on the stand.

2 The testimony is now asking for statements
3 given by Marky Fouse, taken on May 27th, on a matter
4 that has been dismissed by the grand jury, that is
5 not actually before us. The issue of probable cause
6 concerning the incident that allegedly took place on
7 the 15th of May, I believe, is what is relevant.

8 So we're objecting to, both, relevancy and
9 the fact that, from a procedural standpoint, the
10 grand jury has spoken on this. And that for them to
11 try and formulate probable cause based on this
12 conversation is inappropriate.

13 THE COURT: You're not suggesting to the
14 Court that because the grand jury dismissed the case,
15 that the facts and circumstances of that case could
16 not be set forth with regard to the issue of probable
17 cause, are you?

18 MR. BREWINGTON: Judge, I'm not --

19 THE COURT: To use your phraseology, answer
20 that yes or no.

21 MR. BREWINGTON: Judge, and I will. As long
22 as it's consistent throughout, no, I'm not.

23 May I explain at some point?

24 THE COURT: And, People, am I correct, that
25 based upon, among other things, information provided

Det. Cunningham - People - Direct 191

1 by Marky Fouse, that it's your position that that is
2 relevant to the probable cause for Galloway
3 eventually to be in custody when he was spoken to by
4 Detective DeCaro?

5 MR. LaROCCA: Yes, your Honor. And I would
6 say that one, first, I just misspoke a moment ago
7 when I said May 27th. The incident is May 27th. The
8 conversation is about May 28th. I'll deal with the
9 witness with respect to that.

10 That's the point in time when Marky Fouse
11 gave to Detective Aichen, in Detective Cunningham's
12 presence, the statement to the 590 Fulton Avenue,
13 Hempstead, push-in allegation that led this witness
14 to seek to arrest Josiah Galloway and actually arrest
15 him on June 5th.

16 So he was present when the interview took
17 place and he made the arrest based on the information
18 flowing from that, which was the only charge at that
19 point known to be against Josiah Galloway.

20 THE COURT: Did you want to be heard
21 further, Mr. Brewington?

22 MR. BREWINGTON: I believe I stated my
23 point. It appears to the Court that such testimony
24 would be relevant and also admissible.

25 Please recall the witness.

Janine M. Colasanti, RPR, OCR

Det. Cunningham - People - Direct 192

1 (Whereupon, the witness resumed the witness
2 stand.)

3 BY MR. LaROCCA: (Continuing)

4 Q. Detective Cunningham, to go back, I misspoke
5 earlier. On May 28, 2008, at approximately 2300 hours,
6 were you present when Detective Aichen had a conversation
7 with Marky Fouse?

8 A. Yes, I was.

9 Q. Was that concerning an incident that was alleged
10 to have occurred?

11 A. Yes.

12 Q. What was the sum and substance of that incident
13 that you heard Marky Fouse describe?

14 MR. BREWINGTON: Objection. The relevancy,
15 the sum and substance, Judge?

16 THE COURT: Overruled.

17 A. Marky Fouse was reporting that he was a victim of
18 a push-in robbery at his address.

19 Q. What was that address?

20 A. 590 Fulton Avenue, Apartment 4B, as in boy.

21 Q. What did he describe concerning the circumstance
22 of that push-in robbery?

23 A. There was a knock at his door. He answered his
24 door. Three male blacks known to him entered with
25 handguns and proceeded to rob him.

Det. Cunningham - People - Direct 193

1 Q. When you say known to him, did he identify the
2 three by name?

3 A. Yes.

4 MR. BREWINGTON: Objection.

5 THE COURT: Overruled.

6 A. Yes, he did.

7 Q. What names did he give?

8 A. Robert Ogleytree, Maurice Boyle and Josiah
9 Galloway.

10 Q. You were present for that conversation?

11 A. Yes, I was.

12 Q. Did you act on that conversation with respect to
13 Josiah Galloway and Robert Ogleytree?

14 A. Yes, I did.

15 Q. What actions did you take based on their
16 statements provided by Marky Fouse?

17 A. Approximately a week later I arrested both
18 subjects.

19 Q. And how did you come to locate them?

20 A. I had received information of their location. I
21 responded there. They were there. They were placed under
22 arrest and transported back to the Armory.

23 Q. Did you know them?

24 A. Yes, I did.

25 Q. Both by name and by sight?

Det. Cunningham - People - Direct 194

1 A. Yes.

2 Q. Do you recall where that arrest took place?

3 A. It was on the corner of Windsor and, I believe,
4 Pierson Avenue in the Village of Hempstead.

5 Q. Had you been asked or directed to do that, or
6 were you acting on your own initiative?

7 MR. BREWINGTON: Objection.

8 THE COURT: Overruled.

9 A. As a detective in the Village of Hempstead, I was
10 looking to close the case.

11 Q. You had direct knowledge of Marky Fouse's
12 allegations?

13 A. Yes.

14 Q. How long had you known Josiah Galloway?

15 MR. BREWINGTON: Objection.

16 THE COURT: Overruled.

17 A. Quite a number of years now.

18 Q. Did you recognize him when you saw him that day?

19 A. Yes.

20 Q. Do you see him here in the courtroom today?

21 A. Yes, I do.

22 Q. Can you point to him, describe where he is seated
23 and describe an article of his clothing?

24 A. Male black, sitting at the center of the defense
25 table, wearing a white shirt.

P.O. Cunningham - People - Cross 195

1 Q. When you arrested him --

2 MR. LaROCCA: Your Honor, may the Court
3 reflect the identification of the accused?

4 THE COURT: Any objection?

5 MR. BREWINGTON: No.

6 Q. When you arrested him, where did you take him?

7 A. To the Hempstead Police Armory on Washington
8 Street.

9 Q. Do you know the approximate time of day or night
10 that was?

11 A. It was in the evening hours. I don't recall the
12 exact time.

13 Q. In the evening hours of June 5th?

14 A. Correct.

15 Q. Was he interviewed, or did you become aware of
16 the fact that he was interviewed by the Third Squad
17 detectives in the course of the following morning?

18 A. There came a point in time he was, yes.

19 Q. But you brought him in for the robbery or the
20 alleged robbery of Marky Fouse?

21 A. That's correct.

22 Q. And did Marky Fouse, on May 28, 2008, give a
23 written statement to Detective Aichen concerning the 27th
24 of May 2008 alleged robbery?

25 A. Yes, he did.

P.O. Cunningham - People - Cross 196

1 Q. And you were present?

2 A. Yes, I was.

3 MR. LaROCCA: Thank you. I have nothing
4 further.

5 CROSS-EXAMINATION

6 BY MR. BREWINGTON:

7 Q. So where was Marky Fouse on June 5, 2008 when you
8 arrested Mr. Galloway?

9 MR. LaROCCA: Objection.

10 THE COURT: I'll allow it.

11 A. I don't know.

12 Q. Do you know where he is now?

13 MR. LaROCCA: Objection.

14 THE COURT: Sustained.

15 Q. By the way, when you picked Mr. Galloway up, he
16 was seated in the car, correct?

17 A. Yes, he was.

18 Q. Where was the car, again, please?

19 A. On the corner of Windsor Parkway and I believe it
20 was Pierson Avenue.

21 Q. And that car was a Honda, right?

22 A. I'm not a hundred percent sure.

23 Q. Did you take any notes as to what type of car it
24 was?

25 A. No.

P.O. Cunningham - People - Cross 197

1 MR. LaROCCA: Objection.

2 THE COURT: Overruled.

3 Q. I'm sorry?

4 A. No, I didn't.

5 Q. Did you ever impound the car?

6 A. The car was brought to the Armory. I'm not sure
7 if it was impounded or released back to the Armory.

8 Q. Who made arrangements to have the car taken to
9 the Armory?

10 MR. LaROCCA: Objection. Beyond the scope
11 of this hearing.

12 THE COURT: Sustained.

13 Q. Do you recall what type of car Mr. Galloway was
14 seated in at the time that you arrested him when you say
15 you noticed him?

16 MR. LaROCCA: Objection.

17 THE COURT: Overruled.

18 A. I don't recall the type of car, no. It was a
19 tan-colored vehicle.

20 Q. At the time that you arrested Mr. Galloway, you
21 saw his hairstyle, didn't you?

22 A. That night, yes, I did.

23 Q. What was it?

24 A. I don't recall now.

25 Q. So you did speak to Mr. Galloway several times

P.O. Cunningham - People - Cross 198

1 that evening and that morning, didn't you, at the Armory?

2 A. I brought him into the Armory, then I went to my
3 office. He was down the hall, and the Third Squad
4 continued the investigation.

5 Q. Did you speak to Mr. Galloway several times that
6 day and then into the morning?

7 A. Briefly, yes.

8 Q. And didn't you speak to Mr. Galloway face-to-face
9 when you leaned toward him and wanted him to testify about
10 an alleged murder that you claim he knew something about?
11 Don't you remember that?

12 A. No.

13 Q. I'm sorry?

14 A. No, I don't.

15 Q. Sir, when you did speak to Mr. Galloway, do you
16 remember telling him that if he didn't tell you what you
17 wanted to know, you were going to make sure that he gets
18 pinned with something?

19 A. Absolutely not.

20 Q. Do you recall, sir, at the time that you were
21 speaking to Mr. Galloway, if you saw what his teeth looked
22 like?

23 A. If I was speaking to him, I would have seen what
24 his teeth looked like.

25 Q. As a matter of fact, sir, you saw Mr. Galloway on

P.O. Cunningham - People - Cross 199

1 that evening when you arrested him and you took him into
2 custody, right?

3 A. Yes.

4 Q. You spoke with him, right?

5 A. Yes.

6 Q. He spoke with you, right?

7 A. Yes.

8 Q. And you never noticed anything about his teeth?

9 A. Not that I remember today, no.

10 Q. Sir, let me ask you this, do you have any memory
11 of ever noticing anything about his teeth, putting aside
12 what you know today?

13 MR. LaROCCA: Objection. I don't think that
14 can be --

15 THE COURT: Overruled.

16 A. No, I don't.

17 Q. You never knew that Mr. Galloway has a broken and
18 missing front tooth, a big hole right in the middle of his
19 face?

20 A. Not that I know of.

21 Q. And at the time that you arrested him for that
22 Marky Fouse case -- that case was dismissed, right?

23 MR. LaROCCA: Objection.

24 THE COURT: Sustained.

25 Q. Sir, with regard to the claims made by Mr. Fouse

P.O. Cunningham - People - Cross 200

1 concerning Mr. Galloway, you learned that those matters
2 were not prosecuted, right?

3 MR. LaROCCA: Objection.

4 THE COURT: Sustained.

5 Q. Sir, by the way, when you arrested Mr. Galloway
6 on, I think you said it was on the 5th; is that right?
7 What time was that, please?

8 A. It was in the evening hours. I don't recall the
9 exact time.

10 Q. Did you write down any time when you actually
11 took him into custody?

12 A. He's logged in at the Armory, and it's put over
13 the radio, yes.

14 Q. When you say logged in at the Armory, there is a
15 written record of that, correct?

16 A. There should be. I called --

17 Q. Sir, yes or no?

18 A. It wouldn't be at the Armory. It was
19 headquarters.

20 Q. Headquarters?

21 A. Hempstead Police Headquarters.

22 Q. Do you have that written record here as to what
23 time he was taken into custody and logged in?

24 A. No, I do not.

25 Q. Did you ever provide that to the DA?

P.O. Cunningham - People - Cross 201

1 A. I did not.

2 Q. There would be an affidavit?

3 A. That would be an official police log, yes.

4 MR. BREWINGTON: Judge, we ask for the log.

5 THE COURT: Mr. LaRocca?

6 MR. LaROCCA: I don't have the record. I'll
7 obtain it as the Court directs. But I'm not clear if
8 the witness is saying it's his record or just a
9 record. Either way, if the Court directs, I'll track
10 it down.

11 THE COURT: I think it would be appropriate
12 for you to obtain it, or a copy of it. I don't mean
13 the entire log. I mean a copy of whatever entry
14 pertains to the logging in of this -- of
15 Mr. Galloway. Other than that, provide it to defense
16 counsel.

17 If you'd like, I'd be glad to facilitate
18 matters by giving you the Court's fax information,
19 and if you can obtain it, have it faxed here. But I
20 want to make it clear, I'm not taking on any
21 responsibility of -- I'm just trying to help out.

22 MR. BREWINGTON: Judge, we appreciate the
23 Court's help on that. I would like to have it as
24 soon as possible.

25 MR. LaROCCA: As soon as we have a break,

P.O. Cunningham - People - Cross 202

1 I'll put that in motion.

2 THE COURT: As soon as we have a break, I'll
3 have you speak to my law secretary, and we'll do what
4 we can. If there's a problem, we'll deal with the
5 problem.

6 MR. BREWINGTON: May I inquire, your Honor?

7 THE COURT: Yes.

8 BY MR. BREWINGTON: (Continuing)

9 Q. Your best memory, what time was it that you took
10 Mr. Galloway in custody?

11 A. Like I said, it was in the evening hours. I
12 don't recall the exact time.

13 Q. Was it late evening, that being ten, eleven;
14 early evening, six or seven? Do you have any
15 recollection?

16 A. Later evening. It was dark out.

17 Q. Who else was with you at the time that you took
18 him into custody?

19 A. Police Officer Steven Horowitz, H-O-R-O-W-I-T-Z,
20 Shield 144, Hempstead Police Department, and Police
21 Officer Dennis Sharp, S-H-A-R-P, Nassau County Police
22 Department BSO.

23 Q. You know Police Officer Horowitz responded to an
24 event on 5/15/08 concerning the shooting of a taxicab
25 driver, don't you?

P.O. Cunningham - People - Cross 203

1 A. He responded to that scene, yes.

2 Q. And you knew that at the time that you went and
3 picked up Mr. Galloway, didn't you?

4 A. No, I did not.

5 Q. You didn't know that Police Officer Horowitz was
6 involved with the shooting of the cabdriver on 5/15/08?

7 A. No, I didn't.

8 Q. When did you first learn that, sir?

9 MR. LaROCCA: Objection to the whole line of
10 questioning.

11 THE COURT: I'll allow it.

12 A. After the fact. Sometime after that night.

13 Q. Would it be accurate to say that at the time that
14 you picked up Mr. Galloway with Police Officer Horowitz,
15 that Police Officer Horowitz never said anything about
16 Mr. Galloway allegedly being involved in a incident on
17 5/15/08; is that true?

18 MR. LaROCCA: Objection.

19 THE COURT: I'll allow it.

20 A. That would be correct.

21 Q. Would it also be accurate to say that at the time
22 that you took Mr. Galloway to the Armory, Police Officer
23 Horowitz went with you, right?

24 A. To the Armory, that's correct.

25 Q. And would it also be accurate to say that Police

P.O. Cunningham - People - Cross 204

1 officer Horowitz remained there for a good part of the
2 night until the morning, right?

3 A. That would be accurate.

4 Q. Even while the detective from the Nassau Police
5 Department went in to question Mr. Galloway, right?

6 A. Police Officer Horowitz would have been in the
7 building, yes.

8 Q. And do you recall if Police Officer Horowitz
9 spoke to the detectives from Nassau who were questioning
10 Mr. Galloway?

11 A. I don't know if he did or didn't.

12 Q. Sir, when you say you don't know, were you
13 present at any time when such conversations took place?

14 A. Well, when you say speak to, the detectives come
15 in and he's there. They're going to interact at some
16 point. What they spoke about, I don't know.

17 Q. Sir, at the time that you brought Mr. Galloway to
18 the Armory, what time was that that you arrived?

19 A. Again, I would have to check the police blotter.

20 Q. So that's another entry that you would need,
21 right?

22 A. No. That's the one we spoke about before.

23 Q. It would show the arrest time that you picked him
24 up and the time you arrived at the Armory?

25 A. It would show the time he arrived at the Armory,

P.O. Cunningham - People - Cross 205

1 when the phone was picked up, called headquarters, had him
2 logged in the official blotter, who brought him in, what
3 time he was brought in, his address and date of birth.

4 Q. What time was it that you actually made the
5 arrest; that being, picked him up on the street?

6 THE COURT: Let's not get into an argument.

7 MR. BREWINGTON: I'll clarify my question,
8 Judge.

9 Q. What time was it that you actually picked him up,
10 took custody of him?

11 A. I would have to see Nassau County Form 81, the
12 arrest form.

13 Q. When you say you would have to see that, did you
14 give some notification to Nassau County as to when you
15 actually picked him up?

16 A. I would have given him the arrest time, yes.

17 Q. And that arrest time would have been one that you
18 knew based on writing it down?

19 A. No.

20 Q. Just kept it in your head, right?

21 A. That's correct.

22 Q. So what time was it?

23 A. I told you before, I don't recall.

24 MR. BREWINGTON: Judge, give me one second.
25 I want to see if I can find that for this gentleman.

P.O. Cunningham - People - Cross 206

1 THE COURT: Are you referring to what the
2 witness called the PDCN 81?

3 MR. BREWINGTON: Yes.

4 THE COURT: Mr. LaRocca, maybe you have one
5 of those.

6 MR. LaROCCA: If he is referring to the
7 arrest report, yes.

8 THE COURT: Since Mr. LaRocca has it, do you
9 want it shown to the witness?

10 MR. BREWINGTON: If I can see what
11 Mr. LaRocca has, so I can compare it.

12 MR. LaROCCA: I believe he is referring to
13 what is page nine, ten and eleven of the Rosario
14 material.

15 THE COURT: Do you have a copy of that,
16 Mr. Brewington?

17 MR. BREWINGTON: I certainly do.

18 THE COURT: Do you want either his or your
19 copy marked for ID and have it shown to the witness?

20 MR. BREWINGTON: If we can have one of them
21 marked. I need to refer to it. It's nine, ten and
22 eleven, I believe, in the packet.

23 THE COURT: If you want, we'll fish it out
24 of the Court's exhibit, Court Exhibit I.

25 (Whereupon, Defendant's Hearing Exhibit E

P.O. Cunningham - People - Cross 207

1 was marked for identification, only.)

2 THE COURT: Just so the record is clear, we
3 now have an item marked for ID that is a copy of the
4 item that was referred to that comes from the Rosario
5 packet that was provided to the Court as Court
6 Exhibit I. And we've marked that item as Defendant's
7 E.

8 Mr. Brewington, do you want to have that
9 presented to the witness?

10 MR. BREWINGTON: If we could, please.

11 BY MR. BREWINGTON: (Continuing)

12 Q. You have Defendant's E for identification before
13 you?

14 A. Yes, I do.

15 Q. Does that help refresh your recollection as to
16 what time you say you arrested -- actually, took
17 Mr. Galloway into custody?

18 A. Yes, it does.

19 Q. What time is that, sir?

20 A. 2345 hours.

21 Q. That would be 11:45 p.m.; is that right?

22 A. That's correct.

23 Q. Using that time as your approximate time of
24 arrest, what time did you arrive at the Armory?

25 A. It would be sometime after that.

P.O. Cunningham - People - Cross 208

1 Q. I'm certain of that. Can you tell us
2 approximately what time?

3 A. I don't know. I would have to check the blotter.

4 Q. When you arrived at the Armory, did you make any
5 phone calls to any other police enforcement individuals?

6 A. Nassau County Third Squad was notified.

7 Q. Who did you speak with?

8 A. I don't recall.

9 Q. Sir, Defendant's E that is marked for
10 identification, do you recognize this document as a Nassau
11 County Police Department arrest report?

12 A. Yes.

13 Q. This is the one that deals with Josiah Galloway
14 on that morning; is that correct?

15 A. Yes, it does.

16 Q. Would it also be accurate to say that this
17 contains information relative to Mr. Galloway's pedigree,
18 that being his background information?

19 A. Yes.

20 THE COURT: Did you prepare the 81?

21 THE WITNESS: No, I did not.

22 Q. But you recognize this document as one that is
23 utilized both by the Police Department of Hempstead and
24 Nassau County, and it is work that deals in police
25 enforcement; is that correct?

P.O. Cunningham - People - Cross 209

1 MR. LaROCCA: I'm going to object to this --

2 THE COURT: Sustained.

3 Q. Did you give any information, other than the
4 time, with regard to this document?

5 A. Well, I pulled cases. I don't know if that's the
6 information we're talking about. Any cases that are on
7 here, if they were Hempstead cases, I pulled them out of
8 the jacket and gave them to the Third Squad when they
9 arrived.

10 THE COURT: Did anybody question you from
11 Nassau in anticipation of them taking information you
12 gave and putting it into the 81?

13 THE WITNESS: No.

14 MR. BREWINGTON: Thank you, Judge.

15 Q. Other than today, when for the first time did you
16 see this document?

17 A. Probably that night was the first time. And then
18 today is the second time.

19 Q. That being that night of what day?

20 A. He was arrested on the 5th, so it would be the
21 early morning of the 6th.

22 Q. That time, based on your review of the document,
23 was it accurate?

24 A. I never reviewed the document.

25 MR. LaROCCA: Objection.

P.O. Cunningham - People - Cross 210

1 THE COURT: Sustained.

2 Q. Sir, this document, which is Defendant's E for
3 identification, is there anything else that you see on
4 this document that you contributed to it, other than the
5 time that you reported arresting Mr. Galloway?

6 MR. LaROCCA: Objection.

7 THE COURT: I'll allow that.

8 A. I may have been privy to the conversation of what
9 charges were entered, but did I directly put it in here,
10 no.

11 MR. BREWINGTON: Judge, the only other
12 questions I would have for this witness, I need the
13 other document to follow up on, please.

14 THE COURT: Okay.

15 Is there any redirect?

16 MR. LaROCCA: No.

17 THE COURT: Okay. Thanks.

18 (Witness excused.)

19 THE COURT: Are you prepared to call your
20 next witness?

21 MR. LaROCCA: Yes. I don't know if he's out
22 there. I don't know if he's over in the grand jury
23 still.

24 THE COURT: I'm going to have somebody
25 inquire.

Det. Ross - People - Direct 211

1 THE CLERK: They're trying to reach him. He
2 is not answering his phone. He's probably in the
3 grand jury.

4 THE COURT: Let's go off the record.

5 (Whereupon, a short recess was taken.)

6 THE CLERK: The case of the People versus
7 Josiah Galloway, Indictment 135N of '08. Hearing
8 continued.

9 Are the People ready?

10 MR. LaROCCA: The People are ready.

11 THE CLERK: Is defense ready?

12 MR. BREWINGTON: The defense is ready.

13 THE COURT: Please call your next witness.

14 MR. LaROCCA: Detective Matt Ross.

15 THE CLERK: Detective, please step up into
16 the witness box, remain standing and raise your right
17 hand.

18 Det. M A T T H E W R O S S, Shield #834, assigned to the
19 Third Squad of the Nassau County Police Department,
20 called as a witness on behalf of the
21 People, having been duly sworn by the Clerk of the
22 Court, was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. LaROCCA:

25 Q. Good afternoon, Detective Ross.

Det. Ross - People - Direct

212

1 Detective, how long have you been a member of the
2 Nassau County Police Department?

3 A. I'm in my nineteenth year.

4 Q. How long have you been at the Third Squad?

5 A. I'm with the Third Squad about two and-a-half
6 years.

7 Q. How long as a detective?

8 A. I'm in my fourteenth year.

9 Q. Were you working a tour of duty at the Third
10 Squad on August 14th of this year?

11 A. Yes, I was.

12 Q. Did you become involved in the arrangement of the
13 lineup involving the defendant, Josiah Galloway?

14 A. Yes, I did.

15 Q. Can you tell us how you became involved in that
16 process?

17 A. I was asked if I could assist or actually run the
18 lineup on that day, which I did. Detective Dluginski
19 assisted me, along with three other detectives from the
20 Third Squad, along with my supervisor.

21 Q. Had you been previously involved in the
22 investigation?

23 A. Not at all.

24 Q. So when you said, run the lineup, what did that
25 entail?

Det. Ross - People - Direct 213

1 A. Well, it entailed a lot. It entailed getting
2 fillers, making sure witnesses were responding to the
3 Third Precinct and keeping -- being kept separate, getting
4 the room ready, speaking with the defense counsel,
5 speaking with yourself, getting Crime Scene there to
6 photograph the lineup.

7 Q. When you say defense counsel, at the time was
8 that Glenn Hardy?

9 A. Yes, it was.

10 Q. And was he present for the lineup proceedings?

11 A. Yes.

12 Q. Can you describe the procedure that you used;
13 what you actually did in organizing the lineup; how it was
14 conducted?

15 A. The first thing I did was to have a detective
16 that was assigned to everybody that was coming to do the
17 lineup. Detective Strange was assigned to him. And the
18 witness, Mr. Hernandez, had Detective D'Arienzo assigned
19 to him.

20 Q. When you say assigned, for what purpose do --

21 A. Keep them separate from the minute they arrive at
22 the Third Precinct.

23 Q. Go ahead.

24 A. When they arrived, they were brought to the
25 second floor, the inspector's office, with that detective.

Det. Ross - People - Direct 214

1 And at that point, when I had all of the fillers there, I
2 then go and get the defendant from the arrest area. I
3 bring him into the lineup room. I asked him and counsel
4 what number they wanted to sit at. They chose number
5 five. And the fillers come into the room after that.

6 Q. Stop there for a moment. Mr. Hardy was present?

7 A. Yes.

8 Q. And you asked him and the defendant what number
9 they wanted in the lineup array?

10 A. Correct.

11 Q. Which number did they select?

12 A. They chose number five.

13 Q. Did you suggest that number to them in any way?

14 A. No.

15 Q. By the way, was it your understanding that this
16 was a court ordered lineup?

17 A. Yes, it was.

18 Q. So how did you come to determine who should be
19 the fillers?

20 A. We go by a description. Not knowing anything
21 about the case, when I came in earlier that day, Detective
22 Dluginski briefed me on the case and the description of
23 the defendant. And at that point, we went and got five
24 fillers.

25 Q. Continue with your description of how the lineup

Det. Ross - People - Direct

215

1 was conducted.

2 A. Well, once the defendant chooses the number he
3 wants to sit at, the fillers are brought into the room.
4 Then they are covered with sheets, so the only thing that
5 they see is their heads. They all wore hats in this
6 lineup.

7 After the lineup room is set, I then go and
8 briefly speak with the victim and the witness and explain
9 to them what they're about to do, what they're about to
10 see.

11 A lot of times when they do lineups, the people
12 are very nervous. You explain to them who's going to be
13 in the room, who's going to speak to them, and really, the
14 procedure of the lineup.

15 Q. Let me go back to a couple of points. You said
16 in this case they all wore hats?

17 A. Correct.

18 Q. Did they all wear the same hat or different style
19 hats?

20 A. They all wore the same hat.

21 Q. Was that procedure discussed with Glenn Hardy,
22 the defendant's attorney?

23 MR. BREWINGTON: Objection.

24 THE COURT: Overruled.

25 A. Yes, it was.

Det. Ross - People - Direct

216

1 Q. Did he agree to that procedure?

2 MR. BREWINGTON: Objection.

3 THE COURT: Overruled.

4 A. Yes, he did.

5 Q. Was he present when it was actually carried out?

6 A. Yes, he was.

7 Q. So now, you said often people are nervous. But
8 I'm going to ask you to speak about what you did in this
9 particular case. So with that in mind, can you tell us
10 what you did with respect to this particular case?

11 A. First I spoke to Mr. Anyosa, the victim, because
12 he was going to be the first person that viewed the
13 lineup. I explained to him that he's going to be taken
14 from the office that he's sitting in, to the lineup room,
15 the viewing room.

16 I explained to him that there were going to be
17 six individuals with similar characteristics. At that
18 point I told him nobody would speak to him in the lineup
19 room other than Detective Dluginski, the carrying
20 detective.

21 He is instructed to go up to the window, make
22 sure he looks at all six people. And if he identifies
23 anybody, to tell us what number and where he knows that
24 person from.

25 We then went in to view the lineup. Myself and

Det. Ross - People - Direct 217

1 Detective Dluginski walked Mr. Anyosa from the inspector's
2 office, to the lineup viewing room. We entered the
3 viewing room. Detective Dluginski and Mr. Anyosa walked
4 up to the window. I stood directly behind them. One
5 knock was placed on the window, meaning that the lineup is
6 starting. There is a detective inside the viewing room
7 that tells everybody, eyes straight.

8 Q. When you say window, what sort of window is that?

9 A. You can see in, they can't see you.

10 Mr. Anyosa looked at all six individuals, and
11 twenty-three seconds later he identified the person
12 sitting in number five as the person that shot him in the
13 face.

14 Q. How do you know it was twenty-three seconds?

15 A. Because I timed it.

16 Q. Among the people present, was Mr. Hardy present?

17 A. Mr. Hardy -- in the viewing room was Mr. Hardy,
18 myself, Detective Dluginski, Mr. Anyosa, yourself and my
19 sergeant, Detective Sergeant Richard Dawson.

20 Q. Now, what did you do thereafter?

21 A. We immediately leave the room. He goes back to
22 the office that he was in, and Detective Strange is there.
23 And at that time, Detective Strange now takes an
24 identification statement from him.

25 Q. Would you proceed with what happened next in the

Det. Ross - People - Direct

218

1 process?

2 A. I then went into the witness, Mr. Hernandez, and
3 we now took him from that room, back into the viewing
4 room.

5 Q. And what instructions or conversation, if any,
6 did you have with Mr. Hernandez at that point?

7 A. Before he went in there, the instructions that
8 were given to both people; what they were going to view,
9 who was going to speak with them, what it was going to be
10 like when he walked up to the window. To look at all six
11 individuals. If he identifies anybody, to tell us the
12 number and where he identifies that person from.

13 Q. Just to be clear, after Mr. Anyosa made the
14 identification, did he have any contact prior to
15 Mr. Hernandez making his identification of Mr. Galloway?

16 A. No, none whatsoever.

17 Q. So you went and you explained again to
18 Mr. Hernandez what you previously explained to Mr. Anyosa?

19 A. Yes.

20 Q. Was Mr. Anyosa present?

21 A. No.

22 Q. And then what did you do with Mr. Hernandez?

23 A. We left the office where he was situated, to the
24 viewing room, the lineup.

25 Q. And tell us what happened then.

Det. Ross - People - Direct

219

1 A. Mr. Hernandez walked up to the window with
2 Detective Dluginski, with me standing behind him. Again,
3 one knock was placed on the window for eyes straight. And
4 nine seconds later Mr. Hernandez identified the person
5 sitting in number five as the person that they had an
6 argument with earlier on the night of the occurrence.

7 Q. Was Mr. Hardy still present?

8 A. Yes, he was.

9 Q. Was I still present?

10 A. Yes, you were.

11 Q. With regard to the lineup, itself, was there any
12 photograph taken?

13 A. Yes.

14 Q. How? Explain that, please.

15 A. As per procedure, before we run the lineup, we
16 have Crime Scene respond to the place where the lineup was
17 being conducted. And they photograph the lineup as the
18 victims and witnesses would view the lineup.

19 Q. Were you present when that was done?

20 A. Yes.

21 Q. In addition to that, are you familiar with the
22 lineup worksheet?

23 A. Yes, I am.

24 Q. What is a lineup worksheet?

25 A. It's exactly what it states. It's a worksheet

Det. Ross - People - Direct 220

1 that tells you the fillers, the defendants, who's present,
2 what time the lineup is to be viewed. Then there is some
3 empty space where you usually write down the detective
4 assigned to each witness and the victim. It's a worksheet
5 we use.

6 Q. Did you prepare a worksheet with respect to this
7 particular series of lineups?

8 A. Yes, I did.

9 Q. And when in relationship to the lineups did you
10 prepare it?

11 A. As it -- simultaneously. I filled out most of it
12 until the lineup was conducted. And then after the
13 identification, I filled in the times.

14 Q. Do you have the worksheet and the photographs of
15 the lineup with you today?

16 A. Yes, I do.

17 Q. Would you please produce them.

18 MR. LaROCCA: And can I have the worksheet
19 marked? I believe we're up to 14 for identification
20 and the photographs following that.

21 (Whereupon, People's Hearing Exhibit 14
22 was marked for identification, only.)

23 MR. LaROCCA: May I have that shown to the
24 witness, all three.

25 Q. Detective, would you take a look at number 14,

Det. Ross - People - Direct

221

1 please?

2 A. Okay.

3 Q. Do you recognize that document?

4 A. Yes.

5 Q. What do you recognize that to be?

6 A. That's the worksheet, the original worksheet I
7 filled out that day.

8 Q. And you did that at the time that you made the
9 observations and made the entries that are recorded there?

10 A. Correct.

11 Q. At the time of the lineup?

12 A. Correct.

13 Q. And is it in the same condition it was when you
14 made those entries?

15 A. Yes.

16 Q. And does it reflect the times of the lineup and
17 the length of time each witness took to make the
18 identification?

19 A. Yes, it does.

20 Q. And who was present?

21 A. Yes.

22 Q. And who the fillers were?

23 A. Yes.

24 Q. And who the witnesses themselves were?

25 A. Yes.

Det. Ross - People - Direct

222

1 Q. And would you take a look at number 15, please.
2 Do you recognize that?

3 A. Yes.

4 Q. What do you recognize it to be?

5 A. That's the photograph taken the day of the
6 lineup, moments before the victim and the witness viewed
7 the lineup.

8 Q. And does it fairly represent the condition of the
9 room and where the witnesses were at that time?

10 A. Yes.

11 Q. The room and where the members of the lineup
12 were? Excuse me.

13 A. Yes, it does.

14 Q. And would you look at number 16. Do you
15 recognize that photo?

16 A. Yes. It's the same photo, exactly the same
17 photo.

18 Q. The Crime Scene person took two photos?

19 A. No, he took one photo. And it looks like he made
20 two copies of it.

21 Q. It's identical?

22 A. Yes.

23 Q. It appears to be?

24 A. Yes.

25 Q. Is it a fair and accurate depiction as to the

Det. Ross - People - Direct

223

1 position and the nature and the observations of the
2 lineup?

3 A. Yes.

4 Q. Did Mr. Hardy object in any way to any part of
5 the lineup proceeding?

6 MR. BREWINGTON: Objection.

7 THE COURT: Overruled.

8 A. None whatsoever.

9 MR. LaROCCA: May I have those documents
10 admitted into evidence for the purposes of this
11 hearing?

12 THE COURT: Please show them to
13 Mr. Brewington.

14 MR. BREWINGTON: Voir dire, please, Judge.

15 THE COURT: Sure.

16 MR. BREWINGTON: Please put these before the
17 witness, please.

18 VOIR DIRE EXAMINATION

19 BY MR. BREWINGTON:

20 Q. Sir, looking at 15 and 16, those are two
21 photographs. Do you have those, Detective?

22 A. Yes, I do.

23 Q. You say that's a fair and accurate depiction of
24 what the lineup looked like; is that correct?

25 A. Correct.

Det. Ross - People - Direct

224

1 Q. What are the facial features of the person on the
2 number six slot, looking at the photograph?

3 A. Let me put my glasses on.

4 Q. Please do.

5 A. The facial features on number six, had a slight
6 mustache, unshaven. No --

7 Q. My question was, looking at the photograph, what
8 are the --

9 A. Like I said, number six has a mustache and was
10 clean-shaven on his beard.

11 Q. It is your testimony you can see the facial
12 features of number six on those photographs?

13 A. I can see the mustache, yes.

14 Q. Sir, were these photographs taken before or after
15 the witnesses were shown the lineup?

16 A. Before.

17 Q. Would it be accurate to say that with regard to
18 what is shown in the photograph, that being in 15 and 16,
19 that's what you saw when you looked through the window?

20 A. Yes.

21 MR. BREWINGTON: Judge, we'll ask the Court
22 to take a look at those, please. We have an
23 objection.

24 THE COURT: Okay. I've looked at the items.

25 MR. BREWINGTON: We object to them, Judge.

Det. Ross - People - Direct

225

1 we believe that if the photographs themselves being
2 offered exactly depict what the lineup was in this
3 situation, the features in number six cannot be
4 determined. And, therefore, they should not be
5 allowed because they do not appropriately show any
6 features. And the Court can, by its own evaluation
7 of the records, see that.

8 THE COURT: A proper foundation has been
9 laid with regard to their admissibility. However,
10 the point that you make will be taken into
11 consideration when the trier of fact determines what
12 weight, if any, it should give to the items.

13 MR. BREWINGTON: Very well, Judge. I have
14 my objection to the document, and the Court has made
15 its ruling.

16 THE COURT: Was there an objection to 14
17 coming in?

18 MR. BREWINGTON: Just, if I can ask a couple
19 of questions on this.

20 VOIR DIRE EXAMINATION

21 BY MR. BREWINGTON: (Continuing)

22 Q. Is this your handwriting on 14, sir?

23 A. Yes.

24 Q. What time was all of this done?

25 A. What time was all of what done?

Det. Ross - People - Direct

226

1 Q. What you wrote on the document.

2 A. Well, the document, it was prepared mostly before
3 the lineup, but there is some stuff that is added after
4 the lineup or right before the lineup.

5 MR. BREWINGTON: May I just see that
6 original very quickly, please?

7 Judge, for purposes of the hearing, at this
8 time I will not object to that.

9 THE COURT: So 14, 15 and 16 for ID are now
10 in evidence as 14, 15, and 16 in evidence
11 respectfully for purposes of the hearing.

12 I'll ask the reporter to so mark them.

13 (Whereupon, People's Hearing Exhibits 14
14 through 16 were marked for identification, only.)

15 MR. LaROCCA: Could you provide those to the
16 detective, please.

17 DIRECT EXAMINATION

18 BY MR. LaROCCA: (Continuing)

19 Q. Detective, when you observed the lineup, how far
20 would the witness have been from the six seated people;
21 what would be the distance separating the two?

22 A. The distance from where I'm sitting, to where you
23 would sit.

24 Q. Are you talking about the government's chair?

25 A. Yes.

Det. Ross - People - Direct 227

1 Q. Can you estimate that, maybe ten, fifteen feet?

2 A. Ten feet, twelve feet.

3 Q. And was the lineup room well lit?

4 A. It was well lit.

5 Q. Was there any obstruction, other than the one
6 mirror between the witness and the six members there?

7 A. None.

8 Q. Were you able to see the individual features of
9 each of the six members of the lineup?

10 A. Yes, I was.

11 Q. Regardless of the lighting in the photograph
12 itself?

13 MR. BREWINGTON: Objection.

14 THE COURT: Does that conclude your direct?

15 MR. BREWINGTON: Judge, I had an objection
16 that was outstanding to the last question.

17 THE COURT: I'm going to overrule the
18 objection and allow the answer to stand.

19 Both sides approach.

20 (Whereupon, there was a bench conference
21 held off the record.)

22 THE COURT: We're going to break for lunch
23 now, so I'll excuse the detective. We'll have you
24 back at two.

25 THE WITNESS: Yes, you will.

Det. Ross - People - Direct

228

(Witness leaves the courtroom.)

THE COURT: At this time, I also want the record to reflect that it appears that the Hempstead Police Department has, in fact, faxed to my chambers a copy of the item we were talking about. So I'm going to turn it over to the People, and then to the defense. It's a two-page document which appears to be a cover sheet and then a page that has the heading 176, Friday, June 6, 2008.

MR. BREWINGTON: Thank you, Judge.

MR. LaROCCA: Thank you.

THE COURT: We'll break now, and we'll resume at two o'clock. Everyone have a nice lunch.

(Whereupon, a luncheon recess was taken.)

Proceedings

229

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A F T E R N O O N S E S S I O N

THE CLERK: People verse Josiah Galloway,
Indictment 1315N of '08.

Are the People ready?

MR. LaROCCA: The People are ready?

THE CLERK: Is defense ready?

MR. BREWINGTON: Defense is ready.

MR. LaROCCA: May I place something on the
record, your Honor?

THE COURT: Yes.

MR. LaROCCA: During the break,
Mr. Brewington asked me if I could obtain a full copy
of the log sheet that was faxed to the Court, and
Detective Cunningham went down to Hempstead and
retrieved a copy, on the break.

I've given copies of it to both the Court
and Mr. Brewington. And based on that,
Mr. Brewington has advised me that he was not going
to seek to recall Mr. Cunningham.

THE COURT: why don't we just mark it for
identification purposes as a People's exhibit?

THE CLERK: That will be Exhibit 17.

(Whereupon, People's Hearing Exhibit 17
was marked for identification, only.)

Det. Ross - People - Cross

1 THE COURT OFFICER: People's 17 for
2 identification.

3 THE COURT: Mr. Brewington, do you
4 acknowledge receipt of People's 17?

5 MR. BREWINGTON: Yes, we do.

6 We thank the District Attorney's office for
7 making the effort of getting it, and we appreciate
8 it.

9 MR. LaROCCA: Thank you.

10 THE COURT: Let's call the witness.

11 MR. LaROCCA: Detective Ross.

12 Det. M A T T H E W R O S S, having been previously
13 duly sworn by the Clerk of the Court, resumed the
14 witness stand and further testified as follows:

15 CROSS-EXAMINATION

16 BY MR. BREWINGTON:

17 THE CLERK: Detective, you may resume the
18 stand. You are still under oath.

19 MR. BREWINGTON: May I inquire, your Honor.

20 THE COURT: Yes.

21 Q. Good afternoon, Detective Ross.

22 A. Good afternoon.

23 Q. How was your lunch?

24 A. Good.

25 Q. Good.

Det. Ross - People - Cross 231

1 This lineup that you were setting up was pursuant
2 to an order; is that correct?

3 A. Correct.

4 Q. Did you actually see the order?

5 A. No.

6 Q. Do you know what the order required the defendant
7 to do?

8 A. I was only told what it said.

9 Q. Do you know if the order -- were you told if the
10 order required him to stand in a lineup?

11 A. No.

12 Q. When a court order comes down, you understand
13 that it is to be followed specifically, correct?

14 A. Sure.

15 Q. So if the order did indicate that he was to stand
16 in a lineup, you can conduct a lineup standing up,
17 couldn't you?

18 A. We can, but we don't.

19 Q. You indicate that you had gotten certain -- I
20 think your testimony was that you got a description
21 provided to you in order to conduct the lineup; is that
22 correct?

23 A. Correct.

24 Q. What was the description that was provided to
25 you?

Det. Ross - People - Cross

1 A. Male black with short hair.

2 Q. Who gave you that description?

3 A. Detective Dluginski.

4 Q. When you saw Mr. Galloway, did you make any
5 observations of his hair?

6 A. Yes.

7 Q. What were the observations?

8 A. It was up high.

9 MR. BREWINGTON: Defendant's A in evidence.

10 May I show that to the witness, please?

11 THE COURT: Okay.

12 Q. Is that what Mr. Galloway looked like at the time
13 that you first saw him?

14 A. Yes, pretty close.

15 Q. And at the time that his hair was like that, sir,
16 what would you characterize that hairstyle to be?

17 A. What would I call it? Like an Afro.

18 Q. Would you agree with me that that's not cut close
19 to the head?

20 A. I would agree.

21 Q. The other people that were placed in the lineup,
22 what did their hair look like?

23 A. They had all short hair.

24 Q. Would it be accurate to say that Mr. Galloway was
25 the only one with hair that length, as depicted in A that

Det. Ross - People - Cross 233

1 is before you?

2 A. Yes.

3 Q. Would it be also accurate to say that the
4 description as given by Detective Dluginski indicated that
5 the perpetrator of this crime, the shooter, was described
6 as having hair cut short to the head?

7 A. Correct.

8 Q. When you set up this lineup, and the lineup was
9 conducted on August -- what was the date of the lineup?

10 A. 14th.

11 Q. August 14th, would you agree with me that one of
12 the distinguishing factors between Mr. Galloway and the
13 other people was the length of his hair?

14 A. Yes.

15 Q. Sir, what was the height and the description that
16 was given to you, if any?

17 A. Unknown.

18 Q. What was the skin color of the individual given
19 to you, if any?

20 A. I believe medium, medium skin.

21 Q. Sir, at the time that you did set up this lineup,
22 would it be accurate to say that you found five other
23 individuals who were, essentially, police officers?

24 A. They were all police officers.

25 Q. And the five other police officers, when they

Det. Ross - People - Cross 234

1 came into the precinct, how did they enter into the
2 precinct?

3 A. They all entered in the rear door and were placed
4 in the kitchen of the Third Squad.

5 Q. And where was Mr. Galloway at the time that he
6 was in the precinct, other than being in the lineup room?

7 A. He was in the arrest room.

8 Q. When he was in the arrest room, were the
9 witnesses there yet?

10 A. No.

11 Q. Wouldn't it be accurate to say that the witnesses
12 were brought in by the officers that had responsibility
13 for them, one being an Officer Strange -- or Detective
14 Strange, right?

15 A. It's Detective Strange, yes.

16 Q. And when he brought him in, what door did this
17 witness enter through?

18 A. He did not bring them in. I brought them in with
19 Detective Dluginski, in the main door of the Third
20 Precinct. He was taken upstairs to the second floor, into
21 the inspector's office.

22 Q. When I say brought them in, who brought them into
23 the precinct? Who brought them into the precinct, the
24 witnesses?

25 A. How they got to the precinct?

Det. Ross - People - Cross

1 Q. No. Once they got into the parking lot -- this
2 is at the Third; is that correct?

3 A. Yes.

4 Q. The Third is over on Hillside?

5 A. Correct.

6 Q. Once they got to the precinct, who was it that
7 brought them actually into the building?

8 A. They walked themselves into the building, to the
9 front desk where the desk officer sits, this is why they
10 are there. And a phone call is placed up to us, along
11 with Detective Dluginski, to go up to get them.

12 Q. They were not brought in by a detective. They
13 came after making an appointment to come at a particular
14 time; is that correct?

15 A. Correct.

16 Q. You don't know exactly what time each one of them
17 came into the precinct; is that correct?

18 A. They came in sometime after three o'clock. I
19 don't remember the exact time they got there, but sometime
20 after three o'clock.

21 Q. What time was it that Mr. Galloway reached the
22 precinct?

23 A. Late morning. I want to say, somewhere between
24 eleven and twelve.

25 Q. And he was seated in an office someplace; is that

Det. Ross - People - Cross 236

1 correct, Mr. Galloway?

2 A. Mr. Galloway was seated in the arrest room.

3 Q. And witnesses came into the main door and were
4 taken where?

5 A. Upstairs to the second floor, into the
6 inspector's office.

7 Q. What floor is the arrest room?

8 A. There are two arrest rooms. He was in the
9 detective squad arrest room, which is also on the second
10 floor.

11 Q. In order to go to the place where the witnesses
12 went on the second floor, do they have to go past the
13 arrest room?

14 A. No.

15 Q. Is there an arrest room door?

16 A. Yes.

17 Q. And that arrest room door can be opened or
18 closed, correct?

19 A. Yes.

20 Q. And from when you go up the steps in the Third,
21 isn't it true that you can see into the arrest room when
22 you come up the steps?

23 A. No, you cannot.

24 Q. What was the room that the witnesses were taken
25 to?

Det. Ross - People - Cross

1 A. The inspector's office.

2 Q. They weren't taken to the same inspector's
3 office, were they?

4 A. The inspector's office is a huge office with five
5 or six separate offices inside that office.

6 Q. So when you come up the steps, where is the
7 arrest room that Mr. Galloway was in?

8 A. You'd have to go through two sets of doors to get
9 into the detective's squad room. And then it's in the
10 most northwest corner of that room.

11 Q. And when you get into that room, you can see the
12 arrest room, that being the detective squad room?

13 A. When you get into what room?

14 Q. The detective squad room?

15 A. In some areas you can; some areas you can't.

16 Q. Mr. Galloway, what type of clothing was he in at
17 the time that he was in the arrest room?

18 A. Civilian attire. I don't know exactly what he
19 was wearing.

20 Q. Wasn't he in orange?

21 A. No. I don't believe he was.

22 Q. Would you tell us, please, sir, with regard to
23 the photograph that's been identified as, I think it's 15
24 and 16, do you have those photographs there?

25 MR. LaROCCA: They are here.

Det. Ross - People - Cross

1 MR. BREWINGTON: May we place those in front
2 of the witness, please.

3 Thank you, Sergeant.

4 Q. Sir, you indicated these were an accurate
5 depiction of what the lineup would look like, correct?

6 A. Correct.

7 Q. Now, Mr. Galloway is positioned in seat number
8 five; is that correct?

9 A. Correct.

10 Q. And the hats that were placed on the heads was
11 for what purpose? Please tell the Court.

12 A. The hats were placed on the heads of everybody,
13 because the defendant had changed his appearance, as per
14 the court order.

15 Q. I just want to be clear -- and I thank you for
16 volunteering. The hats were placed on the heads --
17 withdrawn.

18 You say that the defendant changed his
19 appearance. Are you saying that he grew his hair within
20 two weeks, three weeks?

21 A. No.

22 Q. So I just want to be clear, you understood that
23 the description of the alleged wrongdoer that shot this
24 gentleman had hair which was cut short to the head, right?

25 A. It said short hair, yes.

Det. Ross - People - Cross

1 Q. When you say short hair, do you know if the
2 description was, it was hair that was cut short to the
3 head?

4 A. No.

5 Q. Would it be accurate to say that at the time that
6 the hats were put on the heads, you decided to put hats on
7 the people's heads?

8 A. Myself, along with the assistant district
9 attorney and the defense counsel.

10 Q. I spoke to defense counsel, by the way, this
11 afternoon. I want to make sure that we're clear. When
12 you say that the defense counsel decided to put hats on,
13 he didn't make the decision, you and the DA did, right;
14 and then you told him what you were doing, right?

15 A. We told him that we wanted to put hats on
16 everybody so everybody would look the same. And he had no
17 objection to doing that.

18 MR. BREWINGTON: Just for the record, I
19 object to it now, Judge. If he didn't then, I'm
20 doing it now.

21 Q. With regard to making everybody look the same,
22 wouldn't you agree with me that one of the major
23 distinguishing factors between everyone in that lineup and
24 Mr. Galloway was the extreme length of his hair?

25 A. Yes. That's why we put the hats on.

Det. Ross - People - Cross

1 Q. So you agree with me that you took away the thing
2 that would make him different and matched the description,
3 right?

4 MR. LaROCCA: Objection.

5 THE COURT: Sustained.

6 Q. You put hats on to take away the distinguishing
7 factor, correct?

8 MR. LaROCCA: Objection.

9 THE COURT: Sustained.

10 Q. You made the determination to place hats on
11 everyone so that the length of his hair could not be seen,
12 correct?

13 A. Correct.

14 Q. And you understood that by putting the hats on,
15 you were taking away the ability of any witness to see how
16 long his hair was, correct?

17 A. I was putting the hats on those individuals to
18 make it fair.

19 MR. BREWINGTON: Judge, I move to strike
20 that as unresponsive.

21 THE COURT: Denied.

22 MR. BREWINGTON: I'm sorry, your Honor.

23 Judge, may I have that question read back so
24 I can hear it, please?

25 THE COURT: Please read back the statement.

Det. Ross - People - Cross

1 (whereupon, the requested testimony was
2 read back by the reporter.)

3 MR. BREWINGTON: I move to strike. I asked,
4 "correct?" It calls for a yes or no answer.

5 MR. LaROCCA: Correct is subject to
6 interpretation.

7 MR. BREWINGTON: Judge, I am so sorry --

8 THE COURT: Correct is like why.

9 Q. Sir, you put those hats on the individuals so
10 that the length of Mr. Galloway's hair could not be seen;
11 is that accurate?

12 THE COURT: That's been asked and answered.

13 MR. BREWINGTON: Very well.

14 Q. Sir, when you put the hat on top of
15 Mr. Galloway's hair with all that hair underneath, did the
16 hat sit on top of his head?

17 A. No. It sat down, just like everyone else, down
18 on the brim of their forehead.

19 Q. Let's go to number six in this photograph that's
20 before you, 15 and 16, okay?

21 A. Okay.

22 Q. The individual that's there is identified in 14
23 as Jimmy Lee. Do you know Jimmy Lee?

24 A. No.

25 Q. Do you know what Jimmy Lee looks like?

Det. Ross - People - Cross

1 A. I see the photo.

2 Q. Take a good look at the photo, sir. Can you tell
3 me, sir, with regard to the photo, how thick are his
4 eyebrows?

5 MR. LaROCCA: Objection, your Honor. We've
6 already been through what can and cannot be seen in
7 the photo. The photo is in evidence.

8 THE COURT: The photo speaks for itself.
9 With the understanding that there are some things in
10 that photograph that -- let's put it this way, it
11 could be more visible and more clear than the quality
12 that the picture allows.

13 MR. BREWINGTON: Does that mean I can't ask
14 the question, Judge?

15 THE COURT: Right.

16 MR. BREWINGTON: Well, Judge, then how --
17 objection. I take an exception to not being able to
18 ask questions about the specifics of the picture that
19 the People claim depicts --

20 THE COURT: The picture is in evidence.

21 BY MR. BREWINGTON: (Continuing)

22 Q. What is the skin tone of the individual in seat
23 number six?

24 A. If you look at the picture, it looks dark.

25 Q. And what is the feature of the individual's nose

Det. Ross - People - Cross

1 in six, flat or narrow or otherwise? Can you tell us
2 please, the jaw in six, is it square or some other way?

3 A. It looks square.

4 Q. Sir, do you know?

5 A. No, I don't know. You asked me what it looks
6 like.

7 Q. And isn't it true, sir, in looking at this
8 photograph -- by the way, sir, the individual that is
9 seated in six, just so we're clear, do you know what his
10 height was?

11 A. No.

12 Q. And at the time that Mr. Hernandez was asked to
13 look at this lineup, he was the second one; is that
14 correct, Mr. Hernandez?

15 A. Correct.

16 Q. You are saying that this is what the lineup
17 looked like, right?

18 A. Correct.

19 Q. The same thing for the victim, correct?

20 A. Correct.

21 Q. Sir, you testified just a little while ago that
22 the defendant had changed his appearance; do you remember
23 saying that?

24 A. Yes, I do.

25 Q. Changed his appearance from what?

Det. Ross - People - Cross

1 A. From the short hair to having his hair up.

2 Q. Sir, when you say from the short hair, what do
3 you mean from the short hair?

4 A. Exactly what I said, when his hair was short. He
5 now changed it and it's now up high.

6 Q. Sir, did you ever see him with short hair?

7 A. I saw an arrest photo of him.

8 Q. And that arrest photo was from what year?

9 A. This year.

10 Q. And the arrest photo showed cornrows; didn't it?

11 A. Correct.

12 Q. And you're calling that short hair?

13 A. Correct.

14 Q. That's your interpretation of short hair?

15 A. Yes.

16 Q. Just so we're clear, the description that you got
17 when you're setting up the lineup was for short hair, not
18 cornrows, correct?

19 A. Correct.

20 Q. So if Mr. Galloway had cornrows, you wouldn't
21 have used hats?

22 A. I don't know if I would have used hats or not.

23 Q. Because the cornrows would have been different
24 than just short hair, right?

25 A. Correct.

Det. Ross - People - Cross

1 MR. BREWINGTON: I have no further questions
2 of this -- sorry, Judge. Just one other thing.

3 Q. Who was the Crime Scene photographer that took
4 the photograph?

5 A. I don't know. Can I check the paperwork? I
6 don't know his name.

7 Q. Was it done electronically, or was it done with
8 negatives?

9 A. He came in with a 35-millimeter camera. I don't
10 know if it was digital or film. I don't know. Although,
11 I think on the front page of that photo it tells you the
12 roll number that I had. It says, roll one.

13 Q. And sir, you did say that you looked for six
14 individuals with similar characteristics; is that correct?

15 A. Correct.

16 Q. What were the characteristics that you say you
17 were looking for that were similar?

18 A. Male black, medium skin, short hair.

19 Q. Is that it, right?

20 A. Correct.

21 Q. What was the age group you were looking for, by
22 the way?

23 A. I don't even know. I wasn't told an age.

24 Q. Do you know what the age is of Mr. Shemin?

25 A. No. I don't know the age of anyone.

Det. Ross - People - Cross

1 Q. Do you know the age of any of the individuals
2 other than Mr. Galloway?

3 A. I don't know even know Mr. Galloway's age.

4 Q. You put a lineup together and you didn't know if
5 you were looking for someone that was 40 or 20, correct?

6 A. No.

7 Q. You don't know the ages of the individuals in
8 these photographs, correct?

9 A. I don't.

10 Q. Mr. Bellman, Steven, do you know him?

11 A. I know of him. I don't know him personally.

12 Q. Tell the Court how old he is.

13 MR. LaROCCA: Objection.

14 THE COURT: He just said he doesn't know the
15 ages.

16 A. He has been on the job for awhile. I have no
17 idea.

18 Q. You said you know him?

19 A. I said I know of him.

20 Q. How do you know of him?

21 A. He is a police officer in Nassau County. I met
22 him that day.

23 Q. You did meet him. Tell us his approximate age.

24 MR. LaROCCA: Objection.

25 THE COURT: Sustained.

Det. Ross - People - Redirect 247

1 Q. Sir, would it be right to say that when you put
2 this lineup together and put these people in the lineup,
3 you made no allowance for them being in the same age
4 group?

5 A. Age did not determine when I made the lineup.

6 Q. So the answer to my question is?

7 A. What I just said.

8 Q. Would it be accurate to say, sir, when you put
9 this lineup together, that you made no allowances to
10 ensure that these individuals would be in the same age
11 group; is that correct?

12 A. When I called to get fillers and they arrived,
13 when they came to the precinct, I looked at them. And
14 then at that point I made sure they were going to fit the
15 criteria. The criteria, I never looked at age. I never
16 used age once.

17 Q. Thank you. Were there any fillers that came that
18 you rejected?

19 A. I don't believe so.

20 Q. So whoever came is who you put in, right?

21 A. Correct.

22 Q. Regardless of their age, right?

23 A. Correct.

24 Q. Regardless of their hairstyle, right?

25 A. No. They all had short hair.

Det. Ross - People - Recross

248

1 Q. Except for who, your defendant?

2 A. The defendant.

3 Q. That being Mr. Galloway, right?

4 A. Correct.

5 MR. BREWINGTON: Thank you, Detective Ross.

6 THE COURT: Any redirect?

7 MR. LaROCCA: Just very briefly.

8 REDIRECT EXAMINATION

9 BY MR. LaROCCA:

10 Q. Detective, you were asked whether or not the
11 photographs showed the lineup as it appeared for the first
12 witness and the second witness, correct?

13 A. Correct.

14 Q. Was the defendant and his attorney given the
15 option to change his position in the course of the lineup
16 proceedings?

17 MR. BREWINGTON: Objection. Beyond scope.

18 THE COURT: I'm going to allow it.

19 A. Yes.

20 Q. Did he ask to change his position?

21 A. No.

22 Q. Did his attorney ask to change his position?

23 MR. BREWINGTON: Objection.

24 THE COURT: Overruled.

25 A. No.

Proceedings

249

1 Q. Did you endeavor to find and compose a lineup
2 that fairly reflected the characteristics that you were
3 given; male, black, medium skin color, short hair?

4 A. Yes.

5 MR. BREWINGTON: Objection.

6 THE COURT: It's leading. It's sustained.

7 MR. LaROCCA: Thank you. I have nothing
8 further.

9 THE COURT: Any recross?

10 RECROSS-EXAMINATION

11 BY MR. BREWINGTON:

12 Q. There is no better photograph, is there?

13 A. No, not that I know.

14 Q. That's the only one?

15 A. That's what I have.

16 Q. If anybody wants to see what that lineup looks
17 like, that's the only thing you have available, right?

18 A. Correct.

19 MR. BREWINGTON: No further questions.

20 THE COURT: Thank you, Detective.

21 (Witness excused.)

22 THE COURT: People?

23 MR. LaROCCA: The People rest.

24 Thank you, your Honor.

25 THE COURT: Does the defense wish to present

Proceedings

250

1 a case?

2 MR. BREWINGTON: Judge, I think that
3 we've -- no.

4 THE COURT: Are both sides prepared to make
5 an argument, or would both sides prefer that you rely
6 on the record? Why don't both of you speak for a
7 moment.

8 MR. LaROCCA: Argument.

9 THE COURT: What's that?

10 MR. LaROCCA: I believe we're going to make
11 an argument.

12 THE COURT: Since it's the defense's motion,
13 I'll allow the defense to go first, and then I'll
14 hear from the People.

15 MR. BREWINGTON: Judge, thank you.

16 I believe that in this situation we do not
17 know -- I'm going to start first with the Huntley
18 aspect of this case, your Honor.

19 THE COURT: Okay.

20 MR. BREWINGTON: With regard to Huntley,
21 there are statements that are made. I don't believe
22 the People have really identified what statements
23 they claim they are offering.

24 The 710.30 notice which was provided and
25 which we identified as part of the Court's file,

Proceedings

251

1 indicates that there were statements that were
2 offered, one at 4:30 a.m. and one at 4 p.m. on
3 6/6/08. They are both alleged to be -- excuse me,
4 one to be oral and one is alleged to be written.
5 They did not offer any written statement into
6 evidence. So, therefore, Judge, we ask that that be
7 denied immediately.

8 This oral statement that they claim was made
9 at 4:30 a.m., according to the witnesses that have
10 been before this Court, make it clear that they claim
11 that the statement that was made -- again, we have to
12 go by the 710.30 notice, Judge. The statement that
13 was made allegedly about the shooting across the
14 street, that being the Tennessee Avenue claim, was
15 one that, I believe, they indicated was made sometime
16 later on in the day. But their notice was, it was
17 made at 4:30 a.m, and that it was oral.

18 I think that's problematic to begin with, no
19 less the credibility of the officers which were
20 flip-flopped with regard to the statements that they
21 claim were made, how they were made, and the notices
22 of Miranda warnings and when they were given.

23 This is particularly true when we have the
24 testimony by Detective Lipson, that he was called
25 prior to 4:30 a.m. Looking at his testimony, Judge,

Proceedings

252

1 he says he was called sometime in the early morning,
2 that being one or two o'clock, by his partner. And
3 that when his partner called him, according to
4 Detective Lipson, he was still at the precinct. And
5 he was asked to pull together a copy of the sketch
6 that Detective DeCaro claimed was over by his desk.
7 That's important with regard to Huntley because that
8 gives us a time.

9 In that time we know that Detective DeCaro
10 would have had to have been speaking to Mr. Galloway
11 in order for him to have said, Your nose, it looks
12 very familiar. Don't I know you from someplace?
13 whatever his claim was. It was the language that he
14 used.

15 His testimony today was that he made no
16 evaluation, did not sit in front of or talk to
17 Mr. Galloway until 4:30 or after. That makes
18 absolutely no sense, because in order for him to have
19 called Detective Lipson and gotten the sketch brought
20 over to him before 4:30, he would have to have had
21 contact with Mr. Galloway, looked at him and then
22 made this revelation that he looked familiar.

23 Between those two officers, Judge, someone
24 is not being truthful. And I would say because of
25 both of them not being accurate and untruthful, that

Proceedings

253

1 their testimony should not be believed. They are not
2 credible.

3 But, Judge, that alone should not be the end
4 of the analysis. The analysis takes us to the next
5 step, which is, according to Detective DeCaro, that
6 the statement at the point at which he claims that
7 Mr. Galloway all of a sudden became very familiar to
8 him was after 4:30. That's important, Judge, because
9 when we look at the times, according to the testimony
10 of Lipson, the times when the witnesses saw the photo
11 arrays, the first one was at 3:20 a.m., and the
12 second one was at five o'clock a.m, on the 6th.

13 Therefore, his testimony can't be true,
14 because his first contact, according to him today, at
15 least with Mr. Galloway, was at 4:30 a.m. A photo
16 array could not have been put together at 3:20 a.m.
17 if he is first making contact with Mr. Galloway at
18 4:30 a.m. Detective Lipson could not have gone to
19 Glen Head and done a photo array after he did a photo
20 array at the Armory by five o'clock a.m.

21 So the stories and the times don't match up,
22 which raises a question as to why they are
23 manipulating the times to try and somehow fit in this
24 statement, when they really still haven't identified
25 what it is specifically they want the Court to allow

1 in.

2 Credibility is an important thing in a
3 hearing such as this, Judge. We believe what is
4 shown to the Court on the Huntley issue is that the
5 statement that they claim they want to use, which I'm
6 not fully clear on, I think it's this thing that
7 something happened on Tennessee Avenue, in a case
8 that was dismissed. That statement about a shooting
9 across the street, that they claim that Mr. Galloway
10 made, happened at a time that the People have not
11 proven, as is their obligation, that Mr. Galloway was
12 properly noticed, warned, given his Miranda rights,
13 and that it even took place, because they have not
14 been able to solidify for the Court what time it took
15 place.

16 Did it take place in the morning or the
17 afternoon? All of a sudden it became in the p.m.,
18 when the testimony earlier this week on Wednesday was
19 that it all happened in the morning. Judge, we
20 raised questions with regard to that.

21 And we also ask that the suppression of any
22 statement taken from Mr. Galloway is a must, and that
23 it must take place because the People have not met
24 their burden. They have not shown that it did not
25 occur under some sense of harassment, or oppressive

Proceedings

255

1 action, or with regard to full notice being given to
2 Mr. Galloway as to what his rights were.

3 The other thing that we did point out,
4 Judge, was that the officer who was in charge of
5 Mr. Galloway at no time indicated that Mr. Galloway
6 was given an opportunity for water or eating. He
7 said he didn't know. This is the person who was
8 primarily responsible for this man in custody. If
9 that doesn't create a coercive situation, I don't
10 know what does.

11 Typically, we know deprivation of both
12 sleep, food and water is something that is not
13 allowed by the Geneva Convention, no less the United
14 States Constitution.

15 Judge, we want to be real clear, with regard
16 to any statements that they claim were taken, that
17 was totally suppressible. And in this situation,
18 Judge, they have not answered the questions as to how
19 they say what happened, happened in terms of
20 statements taken.

21 If I could turn my attention, Judge, to the
22 issue of probable cause, that being Dunaway. May I
23 do that, your Honor?

24 THE COURT: Sure.

25 MR. BREWINGTON: The People claim that their

Proceedings

256

1 basis for arresting Mr. Galloway in this case is
2 based on an action which was alleged to have occurred
3 on the 27th of May. And that he was picked up by
4 Detective Cunningham and brought to the Armory and
5 questioned, not for one hour or two hours, but held
6 for what we can tell, at least by the records, Judge,
7 seven or eight hours, and questioned numerous times
8 about numerous things.

9 The issue of probable cause, we believe,
10 Judge, hinges on whether or not, with regard to the
11 claims in this case and the claims against him with
12 regard to what happened on the 15th of May, 2008, if
13 there was a basis upon which they had him in custody,
14 whether or not they could question him without
15 allowing him the opportunity to leave.

16 Judge, we have argued and placed before the
17 Court, and I think the district attorney has
18 acknowledged, that the allegations concerning the
19 incident of May 27th were dismissed by the grand
20 jury, and that the dismissal is by a body of
21 authority dealing with the underlying facts of that
22 case. And that as a result of that, Judge, that the
23 People are relying on that arrest and those
24 allegations as the basis of probable cause. And that
25 should not allow a finding of probable cause for the

Proceedings

257

1 holding of Mr. Galloway in this particular case,
2 especially when the statements taken from him, as
3 we've talked before, can't be identified as to when
4 they actually claim that they took that statement
5 from him. Was it before or after the reason that
6 they claim that they picked him up? Was it before or
7 after Miranda warnings were given? The People have
8 not established that.

9 And as a result of that, Judge, we believe
10 that the Court should find that there was no clear
11 probable cause articulated by the People. They have
12 not, at this point, moved forward as they are
13 required to do.

14 As to the final portion, Judge, which would
15 be the photo array and the lineup, we believe that
16 Judge, first, the photo array is misleading from the
17 very beginning.

18 They had Mr. Galloway before them that
19 morning for a long period of time. They made no
20 effort to find or get a photograph of Mr. Galloway as
21 he appeared on June 5, 2008. Instead, what they did
22 was, they went more than a year backwards. That
23 would be fine, until we get to the fact that
24 Mr. Galloway, Judge, his characteristics on May 15th
25 and his characteristics on June 5th and 6th, could

1 not have resembled anything that was depicted in the
2 photographs from 2007.

3 All reasonable people would know that an
4 African-American, such as Mr. Galloway, could not
5 have grown his hair that length, could not have had a
6 bushy Afro that was testified to by Detective Lipson
7 at the time that he was picked up, or could not have
8 had his hair long enough to cornrow, no less, on
9 June 5th.

10 THE COURT: would you agree with me that
11 there is no evidence whatsoever as to what
12 Mr. Galloway's appearance was on May 15, 2008; that
13 nobody came in and testified and said that he knew
14 Mr. Galloway, that he had some dealings with Galloway
15 on the 15th, and that Galloway's hair or description
16 was given?

17 MR. BREWINGTON: Judge, I will agree to
18 that.

19 THE COURT: Okay. Thank you.

20 MR. BREWINGTON: And I agree to that because
21 the reasonable inference of the people, I guess, in
22 our society should understand that what can be drawn
23 is that in order to have hair long enough to cornrow
24 or have a puffy Afro like that, that is not two weeks
25 worth of hair growth.

Proceedings

259

1 And, Judge, the importance of that is that
2 knowing what they had before them on that day, that
3 being on June 5, 2008, they made no effort to try and
4 make sure that Mr. Galloway, who was depicted in a
5 photo array, appeared as he did in that time frame.

6 What they did was, they got a photograph
7 from the past that matched the description and put
8 him in the photo array, not what he looked like on
9 June 5th, but what he looked like in June of 2007
10 when he was 18 or 19 years of age.

11 The importance of that, Judge -- and,
12 obviously, the Court is asked to, in cases such as
13 this, to draw all reasonable inferences that he can,
14 that are appropriate, based on the evidence that is
15 placed before them. That for the officers to know
16 that his hair was either in an Afro, as one officer
17 said, on June 5th, or that his hair was in cornrows
18 on June 5th, there still was no reason for them to
19 conduct a photo array that was as suggestive as it
20 was to match up to a description that did not match
21 Mr. Galloway. It just simply didn't match
22 Mr. Galloway.

23 And that the reasonable inference is that it
24 should not have been allowed and it should not have
25 been done. And that it was done, essentially,

Proceedings

260

1 because now we know that Detective Horowitz was part
2 of this whole process. And we got testimony that Mr.
3 Horowitz was part of the June 15th -- excuse me, the
4 May 15th shooting. All of a sudden, Judge, we start
5 to see what the connection is here.

6 They made no effort to try and establish
7 with regard to the claims that the perpetrator of
8 this crime that shot this cabdriver was almost
9 six feet tall. And the claim, according to Detective
10 Lipson or the other detective, that Mr. Galloway is
11 almost six feet tall is ridiculous. He is five foot
12 five. It's clear, not only by the police records,
13 it's clear here by looking at him, Judge. Again, it
14 is a reasonable inference for the Court to see and
15 evaluate.

16 Judge, we believe that if the Court takes a
17 close look at what took place in terms of this photo
18 array, the Court will be able to determine that --
19 and, again, looking also at the composite sketch,
20 Judge, which is in evidence before the Court, that
21 Mr. Galloway's appearance does not match what it says
22 on the sketch.

23 It says, first of all, that the person is
24 twenty-five to thirty. That doesn't match
25 Mr. Galloway. That the height is 70 to 71 inches.

Proceedings

261

1 That doesn't match Mr. Galloway. The hair is dark in
2 color, cut tight to the head. It doesn't say
3 cornrows to the head. It doesn't say Afro to the
4 head. It says, cut tight to the head.

5 And even Detective Ross who went out to get
6 fillers knew what he was looking for. That's why he
7 put a cap on top of these individuals to hide the one
8 distinguishing factor that would have given
9 Mr. Galloway the chance that he was entitled to.

10 They did not provide this Court with regard
11 to Exhibits 15 and 16 that which the Court of Appeals
12 and the Appellate Division and Second Department
13 clearly require, that they must show a photograph of
14 the lineup that gives a clear indication of what the
15 lineup looked like, every one of the people in the
16 lineup, so that they can overcome any claim that it
17 was suggestive.

18 People versus Stokes, 139 AD2d, 785 Second
19 Department, People versus Johnson, 106 AD2d, 469, and
20 People versus Lewis, that's a Supreme Court case,
21 Judge, 20 Misc.3rd 1136A. Judge, we argue that those
22 cases stand for the proposition that failure of the
23 People to preserve a photo array and lineup for a
24 hearing, and to show that the actual lineup was
25 nonsuggestive, calls for the suppression of the

1 entire lineup as it was conducted.

2 And, Judge, in this case, the Appellate
3 Division is also clear that the using of baseball
4 caps or any other cap for individuals in a lineup is
5 allowed. I want to be clear that I understand that
6 that is something that can be done. But the way that
7 it was done here is the inverse reasoning as to why
8 the Court of Appeals and the Appellate Division say
9 that it can be done.

10 Normally caps are used when the individual
11 has a distinctive -- that being the subject of the
12 lineup -- has a distinctive factor that sets him
13 apart from the other persons in the lineup, such so,
14 that that distinctive factor was part of the
15 description. And, therefore, if he's the only one
16 with that descriptive factor, then that points to
17 him.

18 In this situation, we know that the
19 distinguishing factor was not part of the description
20 given by the witnesses or the claimed description.

21 The distinguishing factor that Mr. Galloway
22 had was the length of his hair. And the length of
23 his hair was the thing that set him apart, separate
24 and apart from the other people in the lineup; not as
25 a way of pointing him out as being the perpetrator,

1 but distinguishing him. Because if indeed that was
2 his hair, as we are arguing it was, there is no way
3 that these witnesses should not have been allowed to
4 see that, because it would have distinguished him
5 sufficiently to allow them not to select him.

6 As the Court of Appeals and the Appellate
7 Division has indicated, that when a prominent aspect
8 or distinctive haircut exists, that the distinctive
9 haircut, if it was identified by a witness, if you
10 can't get fillers to match that, then you cover it
11 up.

12 Here the distinctive aspects of
13 Mr. Galloway's haircut was the length of his hair.
14 And that should not have been covered up and taken
15 away from him by putting caps on, because it is the
16 inverse reasoning, and actually is contrary to the
17 reasoning of the Appellate Division.

18 Judge, People versus Carolina, 184, AD2d
19 520, deals with that. You can actually use the caps,
20 but for the purpose -- not for the purpose that we're
21 dealing with here, for the other purpose; that being,
22 when the distinguishing factor sets the defendant
23 apart and makes it so suggestive that he was the
24 person.

25 Here the fact of the length of his hair

1 would have shown this witness and these witnesses
2 that he wasn't the person, because their unwavering
3 description, according to the People and what they
4 put in, was that it was cut short to the head. That
5 was not Mr. Galloway's hair length. It was not his
6 hair length at the time of his arrest. It was not
7 his hair length at the time of the lineup. It was
8 not the length of his hair at the time they picked
9 him up. And it couldn't have been the length of his
10 hair a couple of weeks earlier, because if it's cut
11 short to his head, there is no way you can grow it
12 that long to cornrow it in that time period.

13 Judge, in this situation -- and by the way,
14 Judge, we'll ask the Court not only to look at the
15 Carolina case, but also to note that in People versus
16 Moore, 143 AD2d, 1056, the Court struck and
17 suppressed a pretrial identification of the defendant
18 in a lineup when the defendant was the only one in
19 the lineup with braids. And the reason they did that
20 was because the braids were figured prominently in
21 the description of the witness.

22 In this case, the description of the
23 witness -- the witnesses as taken by the detectives
24 and what they put in the sketches and everything
25 else, was that this individual had short hair.

Proceedings

265

1 I told the Court, and I want to be clear,
2 the reasoning in this case, People versus Moore, is
3 the exact reason why they could not use caps. They
4 should not have been able to use caps. Because what
5 they did was, they robbed the defendant of part of
6 his ability to defend himself in his lineup by taking
7 away the distinguishing factor that didn't match the
8 description but set him apart. And by doing that,
9 Judge, they significantly made this overly
10 suggestive, significantly, because the witnesses said
11 that it was short. If they saw the longer hair, that
12 would have made a big difference.

13 Therefore, Judge, in this situation, as the
14 detectives all indicate, the length of his hair was
15 not -- no matter how you say big Afro or cornrows, it
16 was not cut short to his head, period, the end. And
17 as a result of that they made both the lineup and the
18 photo array improperly and overly suggestive.

19 And, Judge, we ask the Court to suppress any
20 of the statements that the People claim they're going
21 to use. And we don't quite know what they are.

22 With regard to probable cause, there was no
23 probable cause.

24 With regard to the photo array and the
25 lineup, both of those should be suppressed as

Proceedings

266

1 inappropriate and overly suggestive actions taken by
2 the police to try and identify the perpetrator,
3 because by doing what they did, they took away
4 Mr. Galloway's rights.

5 Thank you, Judge.

6 THE COURT: Thank you.

7 Mr. LaRocca.

8 MR. LaROCCA: Thank you, your Honor.

9 Your Honor, if I may, I would like to start
10 with the probable cause issue and start by saying
11 that, essentially, there is no issue.

12 You heard from Detective Cunningham that he
13 was present when an identified citizen by the name of
14 Marty Fouse gave a statement to the police, a written
15 statement, in Detective Cunningham's presence, that
16 the night before he had been a victim of a push-in
17 burglary robbery at his home at 590 Fulton Avenue, in
18 Hempstead. And that he knew the three men who had
19 robbed and burglarized him at gunpoint, knew them by
20 name, gave their names, Josiah Galloway, Robert
21 Ogleytree and Maurice Boyle.

22 Detective Cunningham was present, was
23 familiar with that allegation, that incident. And
24 based on that allegation and that incident from a
25 known citizen, actively was in pursuit of or looking

1 for the named suspects in that case, including the
2 defendant, Josiah Galloway.

3 They received information on June 5th as to
4 Josiah Galloway's location. They went to that
5 location within the Town of Hempstead, in Nassau
6 County, observed Josiah Galloway and another subject,
7 Robert Ogleytree, and placed them lawfully under
8 arrest for the allegation raised by Marky Fouse.

9 It is crystal clear that regardless of any
10 determination later, whether he is acquitted at trial
11 or dismissed in a grand jury, probable cause is what
12 they had at that point.

13 It wouldn't matter, for instance, if they
14 had more information later that would have justified
15 that result. It's whether the information that they
16 had was of a good faith basis and had probable cause
17 to act on that good faith basis. And they did, they
18 had both. And they acted on that basis.

19 It is in no way denied or does it lose its
20 persuasive character simply because that charge for
21 which he was arrested was later dismissed by the
22 grand jury. The grand jury can dismiss the case for
23 any or no reason. It's within their purview. It's
24 not the same as a legal determination as to whether
25 probable cause existed for the arrest of Josiah

Proceedings

268

1 galloway at the time and place that he was arrested
2 on June 5, 2008.

3 Now, that being said, everything that
4 follows is based on that probable cause. The
5 defendant is in custody, lawfully in custody,
6 lawfully at the Hempstead Police Department, and
7 clearly, lawfully, visible to anyone there who has
8 eyes to see. And Detective DeCaro has eyes to see
9 the defendant.

10 The probable cause merely places him, for
11 the purposes of this charge, in the Hempstead Police
12 Department and gives Detective DeCaro an opportunity
13 to see him, and then to recognize, or at least
14 believe he recognizes to himself, a similarity
15 between that and the composite sketch that Detective
16 DeCaro has had at his desk at the Third Squad for the
17 two weeks or so since the May 15th incident with the
18 taxicab driver.

19 So all the probable cause does is put Josiah
20 galloway in a position where his features can be seen
21 by a witness who believes the composite sketch
22 matches.

23 Now, at that point, Detective DeCaro
24 confirms, gets a copy of the composite sketch,
25 discerns he does believe there are similarities.

Proceedings

269

1 You have the composite sketch. You can make
2 your own observations, but that really isn't an
3 issue.

4 He then asks Detective Lipson to perform two
5 photo arrays for the witnesses involved in that case,
6 including the victim in that case. The witnesses are
7 shown two separate photo arrays. And Detective
8 Lipson has described to the Court the manner in which
9 he conducted the photo array. And he generated the
10 most recent one in the Rogues Gallery, and that he
11 was not previously involved in the case.

12 You have the two photo arrays. And I will
13 point out that in number -- in the Wilmer Hernandez
14 photo array, the defendant is depicted in the number
15 two spot. And in the Jorge Anyosa photo array, the
16 defendant is depicted in the number five spot.

17 So the police went to the extra effort of
18 doing two photo arrays and not simply using a single
19 copy of the same photo array where the defendant was
20 depicted in different spots. Not only were the
21 witnesses in separate locations, at different times
22 shown photo arrays, they were shown photo arrays
23 where the numbering was different. And each time
24 there were identifications.

25 Now, I would also point out, your Honor,

Proceedings

270

1 that Detective Lipson certainly didn't have the
2 defendant in front of him when he generated the photo
3 array. He was at the Third Squad. The arrest photo
4 which Detective DeCaro has testified about, and which
5 is in evidence, clearly shows that the defendant at
6 the time of his arrest with DeCaro and what could
7 reasonably -- and I would ask the Court to use your
8 own powers of observation -- be described as what
9 appears to be short hair or tight to the head braids.
10 The arrest photo is in evidence. And it is not
11 markedly different from the short hair in the photo
12 arrays, and that is a distinction without a
13 difference.

14 They acted on the photographs they had.
15 There was no undue suggestion with either witness.
16 And it matches in significant degree the actual
17 appearance of the defendant at the time of his
18 arrest. And as the Court has pointed out, this is
19 still somewhere in the neighborhood -- well, we can
20 do it precisely. The incident was alleged to have
21 occurred on May 15th, and the arrest is June 5th.
22 And now we're into the morning of June 6th.

23 Now, there is plenty of time to change the
24 appearance, to do any number of things. But the
25 point, your Honor, is, the ultimate point is, at that

Proceedings

1 point in time, on June 5th and June 6th, there was no
2 great difference in appearance between the way the
3 defendant's hair appeared at the time of his arrest,
4 as depicted in the arrest photo, and the way it
5 appears in the photo arrays, either one of them.
6 They both appear short, close to the head.

7 At the time of the arrest, his cornrows, to
8 the extent you call them that, or his braids, if you
9 use a different term, are tight and close to the
10 head. And you have the arrest photo to make that
11 determination, as well.

12 With respect to those photo arrays, the only
13 time line that particularly counts with the photo
14 arrays is that there is probable cause for him to be
15 sitting in the Hempstead Armory so that his face can
16 be seen by someone with eyes to see.

17 While we're doing the identification
18 procedure, let me just stay on that track. Clearly,
19 there was a court ordered lineup here. The defendant
20 appeared in that lineup. His attorney was present.
21 His attorney consented to that lineup. You have
22 testimony that his attorney agreed to the way the
23 lineup was conducted, including the fact that he was
24 present; that they had the right to pick where they
25 were in the lineup; they had the right to change that

1 between lineups, and that it was done in accordance
2 with appropriate protocols and procedures.

3 It would have been the height of
4 irresponsibility to allow the defendant to sit in
5 that lineup with his braids undone, his hair teased,
6 and have him stand out as if there were an arrow
7 pointing to him from the other members of the lineup.

8 If you're going to single out the defendant
9 in this case, that would be the perfect way of
10 conducting the lineup, because it draws attention to
11 which one of these six doesn't look like anyone else
12 in that lineup. And to avoid that, the People, to be
13 fair, and the defense attorney was present and
14 consented, put identical caps on all six individuals,
15 and that lineup was conducted.

16 Regrettably, I would say, to the extent that
17 the photograph flash washes out some feature of some
18 individual, not the defendant, in that lineup, it
19 doesn't change the fairness of the lineup, the
20 characteristics of the lineup, the description by the
21 witness of the lineup, the fact that the attorney was
22 present and did not object in any way to the lineup,
23 and so forth and so on.

24 And the lineup was conducted with meticulous
25 regard for the defendant's rights and to keep any

Proceedings

273

1 possibility that either witness would see the
2 defendant prior to the lineup, either witness would
3 have a chance to confer before or after concerning
4 the position or procedure of the lineup. Again, that
5 is described in great detail, and, again, it is done
6 in accordance with the law.

7 with respect to whether they're seated or
8 standing, it is a fair and legally sufficient lineup
9 procedure.

10 Now, with regard to the statement. The
11 stipulations, I believe, and certainly the voluntary
12 disclosure described two statements. And contained
13 in the voluntary disclosure, the written statement
14 which involves the incident at 590 Fulton Avenue that
15 Marky Fouse described to the police. The incident
16 that counsel and I both explained to the Court has
17 been dismissed by the grand jury. We are not seeking
18 to introduce it. It is just brought up in the
19 context of this hearing to explain why he was sitting
20 in the Hempstead Armory, so that a detective with
21 eyes to see could see him. There is nothing about
22 that statement that I am seeking to introduce.

23 Now, I would agree and point out to the
24 Court that his denial when he was asked the questions
25 about his involvement in the taxicab driver incident,

Proceedings

274

1 this incident, was not noticed here. And we're not
2 seeking to introduce on our direct case anything with
3 respect to that.

4 However, at the end of this process, when
5 the police are talking about anything else, and
6 talking about the shooting, the defendant
7 volunteers -- and I'll come back to what I was going
8 to say -- but he volunteers information concerning a
9 Tennessee Avenue, Hempstead shooting that Detective
10 DeCaro was completely unaware of, even at that point
11 in time.

12 He had gone there for the 590 Fulton Avenue
13 incident, the May 27th, Marky Fouse incident. He had
14 seen that the defendant resembled the 5/15 suspect,
15 the taxicab driver shooting, and had acted on that,
16 put that entrain, had gotten denials about that, but
17 had no clue as to any other incident until the
18 defendant raised it himself.

19 And the defendant -- and this is in the
20 710.30 notice -- gave a number of statements
21 concerning that. But the principal sum and substance
22 of which was reflected in the 710.30 notice, he fired
23 once at the guy Marky was with, he paid \$60 for his
24 gun and after the shooting he gave it back to little
25 Tye, referring to that incident. That was done

Proceedings

275

1 after, as all statements were done, after his rights
2 advisement.

3 The rights card is there, and Detective
4 DeCaro was clear that all statements obtained from
5 the defendant concerning the facts and circumstances
6 of any of the incidents were after the rights
7 advisement. And he was also clear, at least when we
8 got to it, that the sequence was, as I have
9 described, first talking about the written statement,
10 or what turns out to be the written statement of the
11 590 incident, and then segues into the denials of the
12 taxicab incident. And last, at some indeterminate
13 point at the end of that process, but on June 6th,
14 the volunteered information about this unrelated
15 Tennessee Avenue shooting in which he describes his
16 possession and use of a handgun.

17 Now, with respect to the contradiction or
18 perceived contradiction between the photo array times
19 and the rights advisement times, I would simply
20 submit to the Court that the witness testified, and
21 even on recross as pointed out, that he did ask
22 Lipson at approximately three o'clock in the morning
23 to get that photo array done.

24 I would submit to the Court that it was
25 clear that he had the opportunity and did make

1 observations of the defendant, Josiah Galloway,
2 during that window between the time he arrived there
3 at the Hempstead Armory, somewhere around
4 one o'clock, and was dealing with Ogleytree and
5 Galloway, until the time he was dealing primarily
6 with Mr. Galloway at 4:30.

7 And it was in that period that he made the
8 physical observations of the defendant's resemblance
9 to the composite sketch that set entrain the photo
10 arrays. But again I would point out that whole
11 period, from the moment he was called until the
12 moment he left, was post-probable cause. Any
13 observation at any point in time of the physical
14 characteristics of the defendant would have been
15 legally permissible to act on because there was a
16 legally permissible, legally sufficient basis for him
17 to be at the Hempstead Armory, the defendant, and for
18 the detective to witness it.

19 I would argue, to the extent that there
20 appears to be a contradiction, this contradiction or
21 distinction without a difference is not a credibility
22 issue. It is, at most, a mistake, at the time that
23 he said things here on the stand, as to when he first
24 physically observed.

25 And if you go back and you look at the times

1 and the ways the questions were asked, there are
2 different times, the formulation changes about when
3 you sat down with him and you were staring, looking
4 at him, rather than simply physically observing him.
5 He has this opportunity, but it doesn't contradict
6 that all his testimony is that the rights advisement
7 was followed by a series of three statements spread
8 out over a number of hours. And that each of the
9 statements about facts and circumstances were as
10 described by the witness.

11 It doesn't contradict the fact that the
12 show-up -- not the show-up, the photo arrays were
13 conducted after probable cause had put the defendant
14 in a position where his physical characteristics
15 could be observed by DeCaro.

16 And it doesn't change the fact that the
17 independent court ordered lineup in August, several
18 months later, when there was a chance to change the
19 appearance, was conducted with fairness and
20 scrupulous regard for the legal rights of the
21 defendant in this case.

22 So given all of that, your Honor, with
23 respect to the statement, we're seeking to be allowed
24 to use the statement concerning the Tennessee Avenue
25 incident that he made to the police.

Proceedings

278

1 And I would point out that it is not the
2 same thing. And the Court should not conflate, as
3 counsel may have asked you to, the idea that the --
4 because the detective cannot recall what or if he ate
5 or drank, that that's the same as to say that he
6 didn't eat or drink. That is simply an absence of
7 recollection.

8 There is no evidence in front of the Court
9 that he was coerced, that he was harassed, as counsel
10 has used that term, that he was starved, that he was
11 denied substance or a drink, or that there was any
12 complaint with regard to any of that.

13 So for all of those reasons, I ask that the
14 evidence not be suppressed, and the People be allowed
15 to use it on our direct case as I've described.

16 Thank you.

17 THE COURT: May I have the exhibits, just
18 the ones that are in evidence.

19 The Court has heard the testimony, seen the
20 witnesses, seen the exhibits, considered the evidence
21 and considered the matter and finds as follows:

22 First of all, the defendant, during the
23 lineup process and during the questioning process
24 was, in fact, in the lawful custody of the police
25 department.

Proceedings

279

1 There was sufficient probable cause when the
2 defendant was arrested.

3 The detective, Detective Cunningham, was
4 present when a citizen gave detailed, credible
5 information that he was the victim of a robbery and a
6 burglary, that he was victimized by three individuals
7 whom he knew, including the defendant, Mr. Galloway.

8 Detective Cunningham knew who Mr. Galloway
9 was. Detective Cunningham acting within his lawful
10 capacity to do so, had the authority to arrest
11 Mr. Galloway based upon this information.

12 Accordingly, the detective came upon
13 Mr. Galloway and another one of the named
14 individuals, Mr. Ogleytree, as they were seated in
15 the vehicle on a street in Hempstead; and at that
16 time placed Mr. Galloway under arrest, which was his
17 lawful right to do.

18 Now, inasmuch as Mr. Galloway was lawfully
19 in custody when Detective DeCaro interacted with him,
20 there was nothing illegal, improper or inappropriate
21 for Detective DeCaro to think or conclude or feel or
22 suspect that the person before him resembled the
23 sketch on an unrelated matter to what they were
24 investigating at the time, but nonetheless, an active
25 and open investigation.

Proceedings

280

1 And it was appropriate, and certainly not in
2 violation of the defendant's rights for Detective
3 DeCaro to put into motion the procedure whereby
4 Mr. Galloway's photograph was placed in a photo
5 array, along with five other individuals who
6 resembled Mr. Galloway in appearance, and for these
7 photographs to be shown to the victim and a witness
8 in the aforesaid open investigation.

9 Now, the photo array was shown separately to
10 the victim and to a person who's described as a
11 witness. There was no suggestibility with regard to
12 the photographs. There was no suggestibility with
13 regard to the procedure that was followed. And there
14 was nothing unreasonably or unduly suggestive in the
15 wording that was used by police personnel during the
16 showing of the photo arrays.

17 And, accordingly, the motion to suppress the
18 viewing of the photo arrays -- or shall I say, the
19 motion to deny the People the opportunity to attempt
20 an in-court trial identification of the defendant
21 based on the photo arrays is denied, because the
22 photo arrays did not violate the constitutional
23 rights of the defendant.

24 Now, with regard to the court ordered
25 lineup, the Court finds, according to the testimony

Proceedings

281

1 and the evidence it was fair, in compliance with the
2 defendant's constitutional and statutory rights. As
3 a matter of fact, he had an attorney present.
4 Neither he nor his attorney objected in any way to
5 any of the procedures. The defendant was allowed to
6 pick the spot that he was to occupy. He was allowed
7 to change the spot if he wanted to do so. He
8 declined to do so.

9 The Court finds that the use of the hats was
10 an attempt to protect the defendant's rights and to
11 ensure fairness. Furthermore, there was certainly no
12 objection rendered by either the defendant or the
13 attorney who was present.

14 Similarly, having the individuals sit was
15 also in an attempt to keep things fair, as well as
16 the use of the sheet.

17 There was nothing that was said or done to
18 coerce or pressure or overly suggest to the
19 individuals who viewed the lineup that they should in
20 any way be unduly directed toward the defendant. And
21 there was nothing unduly suggestive about the
22 procedure of the lineup, the people that were used in
23 the lineup, or any interaction that police personnel
24 had with regard to the civilians who viewed the
25 lineup.

Proceedings

282

1 The motion to suppress testimony with regard
2 to the lineup at trial is denied.

3 Now, with regard to the statements. First
4 of all, the Court has found that the defendant was in
5 lawful custody of the police department at all times
6 during the questioning, from the time he was brought
7 into the Armory, from then on.

8 Now, inasmuch as the People indicated
9 they're not going to use on the direct examination
10 the written statement regarding the so-called 590
11 incident, then there is no need for the Court to make
12 a ruling with regard to the Miranda aspects of that
13 statement.

14 On the other hand, the Court finds that the
15 statement was voluntary.

16 With regard to the second statement
17 regarding the taxicab and the denial, the People
18 indicated they're not going to use that on their
19 direct case. So the Court is going to make no
20 determination with regard to the Miranda aspects, but
21 finds that the statement was given voluntarily.

22 Now, with regard to the last or third
23 statement, the Court finds that the defendant
24 voluntarily offered information regarding the
25 Tennessee Avenue and Hempstead shooting. It wasn't

Proceedings

283

1 the subject of any coercion. It wasn't the subject
2 of any duress. It wasn't the subject of any type of
3 force or pressure from the police department. It was
4 done after the defendant was advised of his
5 constitutional Miranda warnings.

6 The defendant freely and voluntarily
7 indicated that he understood the warnings, that he
8 waived the warnings, was willing to talk to the
9 police, and then did so. He talked to them about a
10 number of matters, including this one.

11 And this last one involving the firing of
12 the gun, and paying \$60, et cetera, that the People
13 intend to use on their direct case, the Court finds
14 that the statement was taken in compliance with the
15 defendant's constitutional, statutory rights. He was
16 not pressured in any way. He was not the subject of
17 the result of coercion.

18 That the defendant made a knowing and
19 intelligent waiver of his Miranda warnings, after
20 having been advised by police personnel, and that the
21 subsequent statement was a product of his free will,
22 after waiving those rights, and is admissible in
23 court.

24 I want to commend both of the attorneys on
25 how they conducted this hearing. They were both very

Proceedings

284

1 professional, very prepared and strong advocates, and
2 very complete in all the legal and factual argument
3 and points that were made. That constitutes the
4 ruling of the Court.

5 MR. BREWINGTON: Thank you, Judge. We have
6 our exception. We note that the Court did rule
7 immediately after our argument. And we did cite some
8 cases, but, obviously, the Court felt it wasn't
9 necessary to look at. Thank you.

10 THE CLERK: What are we doing with this case
11 now?

12 MR. LaROCCA: Your Honor, if I may suggest,
13 Mr. Brewington and I are both going to be in front of
14 Judge Donnino on Wednesday on a trial matter. It
15 might be appropriate to put this down for that day,
16 because Judge Donnino can tell us what we are doing.

17 THE COURT: I'm directing that the attorneys
18 be in front of Judge Donnino at 9 a.m. Wednesday,
19 November 12th, on this matter, on the Galloway
20 matter.

21 MR. LaROCCA: Thank you, your Honor.

22 MR. BREWINGTON: Judge Donnino really
23 doesn't start until 9:30. Is it okay that we come in
24 at 9:30?

25 THE COURT: Yes.

Proceedings

1 MR. BREWINGTON: Thank you.

2 MR. LaROCCA: Thank you.

3 THE COURT: I would like to allow the
4 parties to come up and get whatever items are in
5 evidence.

6 Mr. Brewington, were you going to ask me to
7 allow the defendant to have a phone call?

8 MR. BREWINGTON: Sure.

9 THE COURT: You will advise his family.

10 MR. BREWINGTON: Yes, I appreciate that,
11 Judge.

12

13

* * * * *

14 CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE
15 TRANSCRIPT, ONLY IF AN ORIGINAL, AND ONLY IF CERTIFIED BY
16 THE COURT REPORTER.

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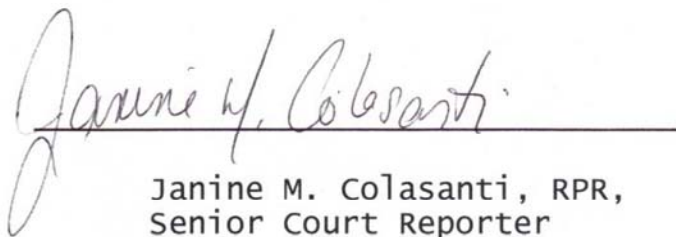
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